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PRACTICE REPORTS

IN THE

SUPREME COURT

AND

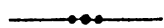
COURT OF APPEALS,

OF THE

STATE OF NEW-YORK.

Nathan Howard, Jr.
By NATHAN HOWARD, Jr.,
COUNSELLOR-AT-LAW, NEW-YORK.

VOLUME XVIII.



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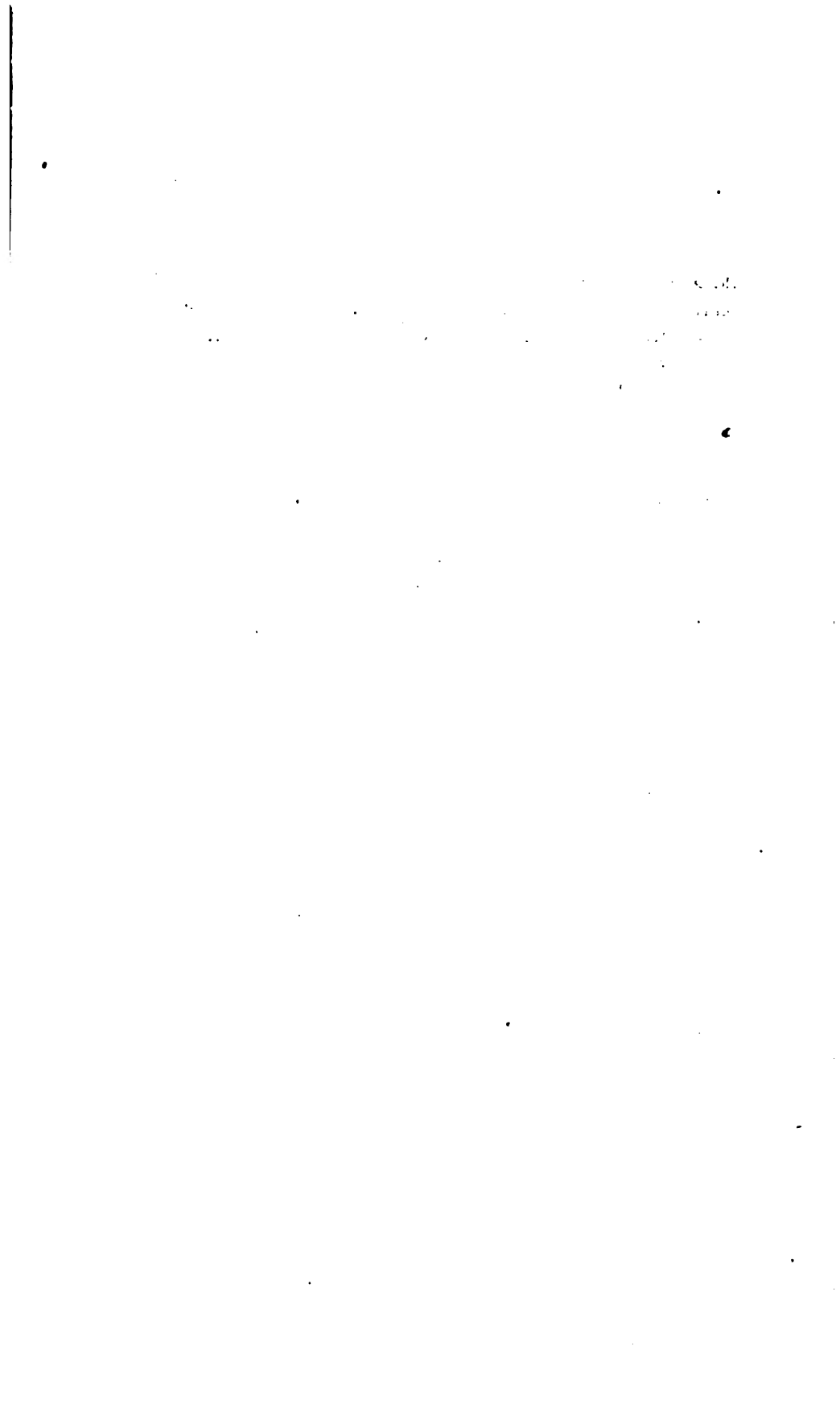
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PRACTICE REPORTS.

SUPERIOR COURT.

THE ACCESSORY TRANSIT COMPANY agt. CORNELIUS K.
GARRISON.

A motion by a receiver to set aside a report of referee and judgment obtained against the party he represents, on the ground of collusion and fraud, will be denied, where the evidence produced, on the motion to sustain such ground, would be insufficient on an actual trial of issues formed in an action brought to secure the same object, to sustain the action. In other words, where it would be the duty of the court, in an action brought to obtain the relief sought by the motion, to dismiss the complaint for want of sufficient evidence to sustain the action, the motion will be denied.

That adjournments were not formally made from day to day, or from the time of one hearing to another, is in itself of no consequence, and does not amount to an irregularity in the proceedings, if both parties gave all the testimony they desired, and submitted the cause on such testimony to be decided by the referee.

New-York Special Term, September, 1859.

A JUDGMENT was entered in this action on the 13th of September, 1858, on the report of a referee, in favor of the defendant, made the 21st of May, 1858.

D. Colden Murray was appointed a receiver of the property and effects of this company, on the 31st of May, 1858; on the 13th of September, 1858, he was served with written notice of the entry of such judgment, as was also his attorney as such receiver, and as was also the attorney in the action of the said company.

The Accessory Transit Company agt. Garrison.

The receiver now moves, pursuant to a notice dated the 27th of July, 1859, for an order vacating said judgment, and the said report of the referee, and the order of reference, and for "leave to proceed with such action, on the ground of irregularity in proceedings before the referee, and of fraud in obtaining such order of reference and entering said judgment, and on the other grounds set forth in the papers served, or for such other or such further relief as to the court shall seem meet."

JOHN SHERWOOD & S. N. TAYLOR, *for the plaintiffs.*

I. T. WILLIAMS & F. B. CUTTING, *for the defendant.*

BOSWORTH, Ch. Justice. There is no irregularity in the proceedings before the referee, so far as the form of procedure is concerned, which can affect the judgment. That adjournments were not formally made from day to day, or from the time of one hearing to that of another, is in itself of no consequence, if both parties gave all the testimony they desired, and submitted the cause on such testimony, to be decided by the referee. So far as regularity consists in conforming the proceedings to the settled practice, and in the observance of established rules and modes of procedure, there is no departure shown amounting to an irregularity that can affect the judgment.

There was no fraud in obtaining the order of reference, in the sense that any artifice or deception was practiced by the defendant to secure a referee, nor was the referee presumptively or in fact biased in his favor, nor was he deficient in capacity or general integrity. His position in all respects, which could possibly exert any influence over him, was well known to all parties, and presumptively would be favorable to the company. His appointment was authorized by a resolution of the company, was satisfactory to the defendant, and was ordered by the court, on the written consent of the attorneys of record, of both parties.

There was no fraud in obtaining such order, unless it was procured with the fraudulent intent and preconceived design

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of going through the forms of a trial before the referee, and of so presenting the case as to secure by collusion with the referee, or without collusion on his part, a report in favor of the defendant, when in justice it ought to be in favor of the plaintiffs for a large amount. No facts are shown, which, if true, would furnish a motive for Mr. Vanderbilt, or any stockholder or officer of the company, to desire such a result. Some circumstances of suspicion are developed, as, for instance, in the testimony of Mr. Doyle; and these are founded not so much by anything which he proves affirmatively, as by his refusal (on grounds sustained by a learned and eminent referee) to answer certain questions put to him. Mr. Green's notes of the testimony of Mr. J. L. White (read on this motion), of testimony given, not in this action, but in another, that Vanderbilt said, "he was disposed to settle with Garrison, and was willing to settle with him," that "they had agreed upon terms of settlement," * * "that he had agreed to dismiss the suit," but if it was dismissed, he had been told, "the company would be liable to Chrysler, under their agreement with him," and thereupon the witness advised, as a mode by which that difficulty could be overcome, "a reference of the suit and a judgment of the court on the referee's report," is not necessarily inconsistent with good faith in Mr. Vanderbilt, and conscientious advice by Mr. White, even if it be assumed that Mr. Green's notes state the testimony given with substantial accuracy. What the terms agreed upon were, is not stated. They may have included an extinction of the claim of Garrison & Co., against the company, amounting to some \$80,000, and have been that much more favorable to the company than the report of the referee. It is consistent with all that Mr. White is alleged to have said, that he supposed a regular reference and a full and fair trial would result in establishing no claim in favor of the company, more beneficial to it than the terms agreed upon. That for that reason he advised a reference, and not for the purpose of defrauding the stockholders and creditors of the company, by an abuse of judicial proceedings. This construction should be given to the declarations thus made and

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The Accessory Transit Company agt. Garrison.

advice given, unless the evidence forbids it. There is no evidence before me, inconsistent with good faith and an honest purpose on the part of both of these gentlemen, in respect to this question.

Mr. Garrison makes affidavit, that the statement in Mr. Green's notes of the testimony of Mr. White, "so far as the same relates to a dismissal of this action or a settlement thereof, so far as deponent's knowledge extends, and as deponent verily believes, is wholly untrue and without foundation." By this I understand him to mean, that it is wholly untrue, that there was, in fact, any settlement agreed upon between him and Vanderbilt, or that the cause was referred with any conclusive design.

The counsel, who conducted the cause on behalf of the company before the referee, swears that so far as he is concerned, "he acted towards said company in good faith, and under the instructions of the board of directors of said company, without any fraud or collusion with said Garrison, or any other person."

The referee swears, that "he supposed and believed, and now believes, that said reference was made for the *bona fide* purpose of a full and fair trial of the matters in controversy between the parties, and in the usual and customary course of references in cases of a like character," and that he then believed, and now believes, that "he decided in strict conformity to the law and facts of the case, * * as presented to him on said reference."

Mr. Vanderbilt's answer to the complaint of Chrysler, in a suit brought by the latter against Vanderbilt and the said company, was read. That answer denies the statements made in that complaint as to an alleged settlement between him and Garrison; Vanderbilt at the time of the alleged conversation between him and Mr. White, or at the time of the alleged settlement with Garrison, was not president of the Accessory Transit Company. The declarations of a third person as to what he said, however accurately reported, are not entitled to much consideration as evidence, on a question like the pres-

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ent, between the parties now before me. But, Mr. Vanderbilt makes an affidavit on this motion, in which he swears that he never settled this suit, "or any of the matters therein, with said Garrison, or with any one on his account. That deponent never said to, or in the hearing of J. L. White, nor any one else, that he had so settled this action, or any matters therein, with said Garrison, or anything to that effect. That deponent had no power to do so, and should not have deemed it proper to interfere therewith, after he ceased to be the president of said company aforesaid," which was the 4th of May, 1857..

It appears that Chrysler was the instigator of this suit, and that it was brought upon an agreement between him and said company, that he should have a specified per centage of the net amount, which, by evidence of his procurement, should be collected from Garrison. His suit against Garrison and the company is brought to obtain an account of the amount received as a consideration for the alleged settlement of the suit, and not to recover damages on the ground of a fraudulent and collusive settlement, whereby he has been prevented from establishing that Garrison really owed the company the large sum which this suit was brought to recover.

To grant this motion, I must hold that the circumstances sworn to, and which are claimed to show, or fairly tend to show, a collusive settlement, should outweigh the direct denials of the parties to the alleged settlement, and the denials of the referee and of the counsel of the company, of there being any such collusive purpose and intent, so far as they know or believe, either in obtaining the reference, or in conducting it.

To so hold, I must find upon the whole papers, at least a fair *prima facie* case of fraud on the part of Vanderbilt and Garrison, as against the company, and that the referee and the company's counsel were privy to it, if not parties to it.

Such a proposition is too unreasonable, on the case as now presented, to be entertained.

It must be borne in mind, that the judgment which the receiver seeks to set aside, on motion, was entered after an actual

trial, which was some months in progress, in which the cause, so far as the record speaks, was decided on its merits.

The receiver and his attorney were notified in writing of the judgment, on the day on which it was entered.

The counsel of the plaintiff swears that after the receiver was appointed, he called on the attorney of the receiver, and "informed him of the then state and condition of the action in general terms, and that the papers were before the referee," and gave said counsel "to understand that he deemed his connection with said suit, and his retainer as counsel for said company, terminated." This is not denied.

This case is different from those in which the court interferes by motion to open a judgment by default or to set aside a judgment entered on bond and warrant of attorney, obtained by some trick or device by which one party has been misled by the other.

In an action brought to obtain the relief sought by this motion, upon such evidence as is now presented before me, the duty to dismiss the complaint would be clear. It would be singular if it were to be set aside on motion, on less evidence than would suffice on an actual trial of issues formed in an action brought to secure the same object.

The motion must be denied. There is no reason to doubt the good faith of the receiver in making the motion, and it is, therefore, denied without costs. There is no reason why a reference should be ordered to ascertain whether the judgment was collusive and fraudulent, or was entered upon a report conscientiously made upon a trial had to ascertain the actual merits.

Such a reference cannot be conducted at much less expense, if any, than an action can be tried, which may be brought to secure the same result.

The receiver, without any permission from the court, if so advised, probably, has the power to bring an action for such a purpose, and to recover any sum which Garrison justly owed, if it can be established that he owed anything to the company. But that is a matter with which the court will not interfere on

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Phelps, Dodge & Co. agt. Brown, Brothers & Co.

behalf of the receiver, on such a state of facts as the evidence of this motion presents.

Motion denied without costs.

UNITED STATES CIRCUIT COURT.

PHELPS, DODGE & Co. agt. BROWN, BROTHERS & Co.

The 12th and 15th sections of the Patent Act of 1836, taken together, were designed to protect the right of the *first inventor*, although he was not the first to adapt his invention to practical use, provided he had filed his *caveat*, and had used reasonable diligence in protecting his discovery.

The purpose of the *caveat* is, to save the discoverer from the effect of the rule of law that gives to the inventor, that first adapts his invention to practical use, the right to the grant of the patent; and in case the commissioner of patents complies with the terms of the 12th section (in giving notice of the filing of another application), it is to secure him against the effect of the rule.

Where the commissioner issues a second patent, the patentee cannot be prejudiced on the trial for the infringement of the patent, by the accidental omission of the commissioner to give him the notice under the 12th section.

New-York, September, 1859.

MOTION for a new trial.

Judge BUEL and S. BALDWIN, of *Ch.*, for plaintiffs.

R. J. INGERSOLL, of *Ch.*, and C. M. KELLER, of *N. Y.*, for defendants.

NELSON, Ch. J. A patent was granted to the plaintiffs as assignees of Wm. C. Camp, on the 9th of January, 1855, for a machine for the manufacturing of brass kettles. On the 16th of January, 1854, Camp had caused to be deposited in the patent office a caveat, describing his invention, with drawings of his machine.

A patent was also granted to O. W. Minard for the same invention, April 18th, 1856, and caveat with drawings annexed,

accurately describing his machine, had been filed in the patent office on April 17th, 1854. The defendants claim under this patent. The application of Camp for a patent was made in November, 1854, within a year from the time of filing the caveat by Minard; but no notice was given him of the interference of Camp's application by the commissioner of patents. Much evidence was given on the trial on both sides as to which of the parties was the original discoverer of the invention.

The court below, in instructing the jury, charged that if Minard was the first and original discoverer, although he might not at the time of the application of Camp's assignees, for a patent, have given practical shape to his discovery, yet if when said application was made, Minard was in fact the first and original discoverer and was using reasonable diligence in adapting and perfecting his machine or invention, Camp's assignees had unjustly obtained a patent within the meaning of the patent law, and the plaintiffs could not recover.

The 12th section of the Patent Act of 1836 provides for the filing of a caveat in the confidential archives of the patent office, and that if application shall be made by any other person, within a year from the filing of the caveat, for a patent for an invention that shall interfere with the one described in the caveat, it is made the duty of the commissioner to give notice to the person filing the caveat, who shall within three months file his description, specifications, drawings and model; and if in the opinion of the commissioner the specifications and claims interfere with each other, like proceedings shall be had as in the case of interfering applications.

The 15th section provides as a defence to an action for an infringement of a patent, among other things, that the plaintiff "had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another who was using reasonable diligence in adapting and perfecting the same." The ruling of the court below turns on these two provisions of the law:

I. There is some difficulty in maintaining the power of the commissioner to issue the patent to the plaintiffs, within the

Phelps, Dodge & Co. sgt. Brown, Brothers & Co.

terms of the 12th section providing for the filing of the caveat, that should be upheld against the right of the party complying with that provision. Instead of issuing the patent, it directs that the commissioner shall file the papers accompanying the subsequent application pending the force of the caveat, and if in his opinion there is an interference, then such proceedings shall be had as in case of interfering applications. These proceedings will be found in the 8th section of the act; but—

II. We are of opinion that the case falls within the scope and meaning of the defence prescribed in the 15th section referred to. It is true there is nothing in the case as assumed by the court below, implicating the good faith of Camp or of his assignees, and hence the injustice relied on is rather injustice in the abstract than resulting from any intentional wrong of the opposite party. We are inclined, however, to think that the term was used and intended to be used in its broadest sense; and that the two provisions, the 12th and 15th sections taken together, were designed to protect the right of the first inventor, although he was not the first to adapt his invention to practical use, provided he has filed his caveat and has used reasonable diligence in protecting his discovery. The purpose of the caveat is to save the discoverer from the effect of the rule of law that gives to the inventor that first adapts his invention to practical use the right to the grant of the patent; and in case the commissioner complies with the terms of the 12th section it is to secure him against the effect of the rule.

It is not surprising, in the multiplicity of applications before the commissioner, that he should accidentally overlook a caveat filed some time before the application by another party, and, doubtless, this officer issued the second patent in this case with the view that the patentee might have an opportunity of correcting the error. He could not be prejudiced by the accidental omission to give him the notice.

New trial ordered.

SUPREME COURT.

WELLINGTON & ABBOTT agt. CLASSON'S.

In an action on contract, against two defendants as partners, where they are to be made jointly liable, and summons and complaint served on only one of them, the other may voluntarily appear under § 139 of the Code, and put in an answer, and the plaintiff is bound to receive the answer, although as soon as received it is ascertained that the defence is *infancy*, and he allowed to discontinue as to such defendant without costs.

New-York Special Term, September, 1859.

THE defendant, Enno J. Classon, a minor not served with summons or complaint, had a guardian *ad litem* appointed, and served an answer; plaintiff declined to receive it on the ground that E. J. Classon was not a party to the action, and had not been brought into court.

The other defendant applied to the court on motion, to compel plaintiffs' attorney to receive the answer of E. J. Classon, upon the authority of *2d Duer*, 650 (special term).

JOHN FITCH, *for plaintiffs*, cited 14 *Barbour (General Term)*, 586; 7 *Howard Pr. Rep.* 238; *id.* 4; *id.* 90.

W. R. DARLING, *for defendants*.

INGRAHAM, Justice. It was never denied under the old practice, where several defendants were included in an action on contract, that any one, not served, might enter a voluntary appearance, notwithstanding the plaintiff did not serve the process upon him. Both at law and in equity, such voluntary appearance was allowed, with the exception that in equity it must appear that some claim was made against the defendant so appearing. (8 *Paige*, 45; 9 *Paige*, 226.)

In *Tracy agt. Reynolds* (7 *How.* 328), Mr. Justice HARRIS recognizes this rule, where he says a party uninvited could not

Wellington & Abbott agt. Classon's.

intrude himself upon the court and the plaintiff, unless he had some right to protect which rendered such appearance necessary.

I do not understand this rule to be altered by the Code. Section 139 recognizes the right of a defendant to make a voluntary appearance without service of a summons, and authorizes the plaintiff to proceed on such appearance as if the defendant had been served with process.

I concur in the opinion of Chief Justice BOSWORTH, in 2 *Duer*, 660, that such appearance is proper and cannot be disregarded.

Applying these authorities to the present case, I think the defendant Classon had a right to appear and put in an answer. The action was on contract and was against both the defendants as partners. They were to be made jointly liable and the joint property of the firm could be taken to pay the recovery against one defendant. No partner is required to be silent and suffer the partnership property to be sold without making a defence, if such defence exists, merely because the plaintiff elects to serve a summons only on his co-partner and not on himself. Such a rule would allow one partner who may have a difficulty with his co-partner, by collusion with a plaintiff, to place the partnership property at risk, when by his appearance the partner not served could protect it against an unjust claim.

I think the plaintiff should have allowed and recognized the appearance of the defendant now moving, and should have received the answer.

But as soon as the answer was received, and the plaintiff ascertained the defence was infancy, he might have obtained leave to discontinue as to such infant without costs—and such permission should now be granted.

No costs can be allowed to the defendant in the action, other than the costs of making this motion.

The motion is granted, unless the plaintiff within ten days discontinues as to the defendant, E. J. Classon, and pays costs of motion, \$7.

SUPREME COURT.

ROBERT CHRISTIE, JR. and others agt. JACOB BLOOMINGDALE.

The Statute (3d Volume, 5th ed., p. 596), authorizing the vacating of the judgment and a new trial in ejectment, does not apply to ejectment for *non-payment of rent*, as the latter is but a substitute for a *re-entry*, which is always *final*. Especially is it not applicable to such an action, where the judgment is rendered upon *demurrer*, and no leave to answer over and go to trial on the fact is claimed or asked on the motion.

Albany Special Term, September, 1859.

MOTION to vacate judgment and for an order for a new trial in ejectment.

A. BINGHAM, *for motion.*

ROBERT CHRISTIE, JR., *opposed.*

GOULD, Justice. This motion is claimed to come under section 30, title 1, chap. 5, part 3, of the Revised Statutes (5th edition, 3d vol, p. 596). And the defendant insists that he is, as a matter of *right*, entitled to the granting of the motion. The preceding section (29), however, is to be taken in immediate connection with section 30. And section 29 says, "every judgment, &c., rendered upon a verdict," &c.; and then section 30 says, "the court in which *such* judgment shall have been rendered," &c., "shall vacate *such* judgment and grant a new trial in such cause."

These two sections make it entirely plain, not merely that the defendant cannot claim to move thus as a matter of *right*, but that the court has no *power* to vacate the judgment under that statute. For, first, it must have been a judgment *rendered on a verdict*, thus involving almost certainly some matter of *fact*, on which the law allowed the taking of the opinions of *two juries*, by reason of the importance of the subject, which.

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is a conclusive and final settlement of the title to real estate. Now, the case before me is not rendered on a verdict, but is a judgment entered by the court on the hearing of a demurrer. (1 *Duer*, 701.)

Secondly, the right of the party against whom "*such a judgment*" (on a verdict) shall be rendered is not what is asked in this case, leave to withdraw a demurrer, and serve an entirely new answer, and *then* go to a trial before a jury *on that*; but it is that the court "*grant a new trial*" on the *same pleadings*. And, when that statute was enacted, an argument upon a demurrer was never called a *trial*, nor was a re-hearing on a demurrer "*a new trial*." The phrase "*trial of an issue of law*" belongs to the Code.

Further to apply the statute to this case, and grant a new trial of the issue of law raised by the demurrer, would be merely to order a re-argument of a cause; and as the final judgment on the demurrer was before the court of appeals, a re-argument can properly be had only in that court, and upon a motion made to that court for leave to re-argue it. Besides, the demurrer concedes *all the facts* set forth in the complaint; and in the complaint (as I understand it), the rate of annual rent reserved by the lease, and the period for which the rent was in arrears, if not the precise amount in dollars and cents, are set forth, and, therefore, admitted. And that admission of a *fact* the defendant should never, in this suit, have liberty to retract. If he can really make a case for relief, it is provided for in section 7 at page 830 of the 3d vol. Revised Statutes (5th edition), under which he could apply to the equity side of this court.

It is further perfectly clear, that said sections 29 and 30 were never intended to apply to the statute remedy of ejectment for rent arrear, inasmuch as those sections contemplate an action in which *damages* as well as costs may be recovered. Whereas, the ejectment for non-payment of rent (5th ed., *Rev. Statutes*, vol. 3, p. 829, §§ 1, 2) is limited to the "*recovery of the possession of the demised premises*," and the costs. And where, in this kind of action, a recovery has been had and the plaintiff has even been put in possession (*pp.* 829, 830, §§ 4, 5),

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the statute giving the action prescribes its own manner and measure of relief, by allowing the tenant *six months* within which to pay the arrears of rent and costs of suit, and thus be restored to his former estate in the lands. And it then goes on to say that, unless he proceeds in that way, he "shall be forever barred and foreclosed *from all relief or remedy in law or equity.*" This, if held to refer to the same class of cases as those referred to by said sections 29 and 30, would be manifestly inconsistent therewith; since these latter give a defendant *three years* within which to claim a new trial as a right. Comparing the two statutes will show that by no possibility can the one under which this motion is made apply to ejectment for non-payment of rent; as in reason it should not, since the latter is but a substitute for a re-entry, which was and is *final*.

Under all the circumstances of this case, after the protracted litigation on this subject, and the elaborate, extended and repeated arguments of such demurrers, there being during all that time no intimation to any court, or at any stage of any cause, that the defendant wished leave to answer, in case the demurrer should be decided against him; I cannot believe that the attorneys make this motion in good faith, or that it is anything but an after-thought, seeking an irregular and improper mode of protracting litigation and opening up questions that have received full and careful investigation, and have been authoritatively decided.

The motion should be denied with costs.

SUPREME COURT.

IN THE MATTER OF THE ATTACHMENT agt. EDWARD BONNAFFE and AUGUST BONNAFFE.

The *Code de Commerce* in France, relating to bankruptcy, does not make the *concordat* (an agreement between the creditors and the insolvent) equivalent to a *discharge* under the English bankrupt law, unless the prescribed number of creditors decide in favor of an *absolute discharge*, and the court sanction it.

Although in the proceedings before the French tribunal, instituted by the creditors of the insolvents (residents of France), the court confirmed the composition to which they had agreed, declaring it obligatory on all, yet, where it appeared that the condition was "that the firm (insolvents) should be entirely acquitted and discharged toward them (the creditors) *by making surrender of their assets*, as well in the states of America, and particularly in the United States of America, and in Mississippi, as in continental France and its colonies, &c," which was accepted by the required majority of creditors, and the agreement in conformity with it was drawn up by the judges and duly entered.

Held—that at this time the assets of the insolvents in New-York, of the value of over \$100,000, being seized, and in the possession of trustees under an attachment issued many months before, the condition of the composition could not be fulfilled by the insolvents, as they could not surrender to the assignees in France all their assets in the United States of America.

The French creditors, therefore, were not precluded (the composition not being a final discharge) from enforcing payment for the remainder of the claims due to them; and had a right, as creditors *pro tanto*, to participate with the American creditors who had merely received dividends from the assignees in France, in the proceeds of the attachment in New-York.

New-York Special Term, June, 1859.

CLERKE, Justice. On the 10th December, 1847, an attachment, pursuant to article 1, title 1, chapter 5, part 2 of the Revised Statutes, was issued against the estate of Edward Bonnafe and August Bonnafe, non-resident debtors. On the 6th of October, 1848, three trustees were appointed, one of whom afterwards died, and another was removed; and two others were substituted in their place. After the appointment of trustees, the officer who had issued the attachment made a report to this court of all the proceedings before him, and filed

it with the clerk in this county. On the 20th of October, 1848, the notice required by law, requiring the creditors to deliver their respective accounts and demands, was duly published on or before the 1st of December, 1848. A general meeting of all the creditors was called and held, at which the several classes of creditors were represented, and a hearing was had before the trustees.

At the time of issuing the attachment, the absent debtors, Edward and August Bonnaffe, were residents of Havre in France, transacting business there, under the style of Bonnaffe & Co. Having become unable to meet their obligations, and being in a state of failure, the president and judges of the Tribunal of Commerce of Havre, on or about the 11th of December, 1847, appointed, pursuant to the *Code de Commerce*, syndics or assignees of their estate; and afterwards such proceedings were had, that a *concordat* (an agreement between the creditors and insolvents) was duly granted to the insolvents, and after having been assented to by more than three-fourths of the creditors in number and amount, was on the 23d day of May, 1848, confirmed and ratified by the Tribunal of Commerce, and was declared obligatory upon all creditors, who had or who had not signed it; upon those whose claims had been proved, as well as upon those whose claims had not been proved, and upon those whose claims had been registered in the statement, as well as upon those whose claims had not been registered. In the proceedings before the trustees, under the attachment issued here, an exemplified copy of the *concordat* and the proceedings connected with it, and a printed copy of the French Code, were admitted in evidence by them.

I agree with Judge JOHNSON, in his opinion in the case of *Coates and Hillard*, that all creditors, whether resident or not, are entitled to dividends under attachments against non-resident debtors; and, as he has dealt with this point at some length, it is unnecessary to discuss it here. I am fully satisfied with his conclusions, and the reasoning by which he has arrived at them. The only questions to be considered here, therefore, are, whether the *concordat* and the judgment of the

Tribunal of Commerce in Havre have operated to such an extent and in such a manner as to deprive the French creditors and the American creditors, who have received dividends under the *concordat*, of the right to participate in the proceeds of the estate, ready for distribution by the trustees under the attachment, issued in New-York?

The effect of a discharge under the English bankrupt act undoubtedly is, to release the bankrupt from all debts contracted in England, which he owed to English creditors at its date, or at the date of the *fiat* in bankruptcy. This principle is, as we all know, well settled in this state. The case to which I have already referred plainly establishes it. And although if the bankrupt does not avail himself by plea of the discharge, at the suit of a creditor, judgment will be recovered against him—he cannot waive his discharge so as to affect other persons, when he is not interested in the result.

If, therefore, the provisions of the Code de Commerce in France, relating to bankruptcy, make the *concordat* and the judgment of the Tribunal of Commerce in relation to it equivalent to a discharge under the English bankrupt law, the decision of the trustees must be deemed erroneous.

The provisions of this Code, as far as they affect the case before us, do not invest the tribunal with the power absolutely and unqualifiedly to discharge the bankrupt from his debts. They only authorize it, even in compulsory proceedings, to sanction the *concordat* or agreement, whatever it may be, between him and his creditors; the French law not allowing private compositions between creditors as among us, but requiring, in order to make them valid, that they should be originated and executed under the direction and subject to the approval of the appropriate tribunal. This is in accordance with the genius of all the political institutions of France. The government intermeddles with everything, and leaves little to the adjustment of individual motives.

If the prescribed number of the creditors decide in favor of an *absolute discharge*, and the court sanction it, I presume the bankrupt is discharged from all future liabilities; and the re-

In the Matter of E. & A. Bonnafe.

sult is similar to that of a discharge under the English bankrupt act. In the proceedings before the French tribunal, instituted by the creditors of Bonnafe & Co., we see, indeed, the confirmation by the court of the composition to which they had agreed, declaring it obligatory on all. But I cannot regard this composition as an absolute discharge. A. Bonnafe, who was authorized to act for the house on this occasion, proposed to the creditors, assembled at the meeting required by the Code, "that the firm should be entirely acquitted and discharged toward them *by making surrender of their assets*, as well in the states of America, and particularly in the United States of America (*and in Mississippi*, it is added), as in Continental France and its colonies," &c. This was accepted by the required majority, an agreement in conformity with it was drawn up by the judges, and was duly entered on the 2d of June, 1848. At this very time, however, all their assets in New-York, of the value of more than one hundred thousand dollars, were seized, and in possession of trustees, under the above-mentioned attachment, issued many months before.

So that an important condition of the composition could not be fulfilled. Bonnafe & Co. could not surrender to the assignees in France all their assets in the United States of America. It matters not whether the bankrupts knew of this attachment; they were unable, in consequence of it, to do what they had stipulated to do. They were utterly incapable of performing a main condition of their discharge. The French creditors, therefore, in my opinion, are not precluded from enforcing payment for the remainder of the claims due to them. They remain *pro tanto* creditors, and as such have a right to participate in the proceeds of the attachment in New-York. If the French creditors, who had signed the composition, have this right, the American creditors, who have merely received dividends from the assignees in France, have, at least, as good a right.

I think the *concordat*, with the appropriate proceedings, was properly proved. It was offered as a foreign judicial record, signed by the clerk of the tribunal, whose signature is authen-

ticated by its presiding judge, whose official identity is attested by the United States consul at Havre. The signature of the clerk is not accompanied by a seal, but I presume it was shown that the court has no seal; in fact it has none.

The French Code was proved substantially in conformity with section 426 of the Code. At all events, even if the trustees erred in their ruling on these points, having arrived at a decision in opposition to those who have urged an absolute discharge of the bankrupts as against the French creditors, the error would not be of sufficient importance to require that the decision should be set aside on this ground.

As to the objection that the decision of the trustees should be brought before the court by *certiorari*, the statute expressly declares, that after the officer who issued the warrant shall make his report, the supreme court shall have jurisdiction over the proceedings (3 R. S., 5th ed., 89, § 71), and by section 73, the court may proceed to do such acts and things as remain to be done to complete the proceedings. The distribution of the proceeds by the trustees is a ministerial not a judicial act. To be sure, the manner of the distribution depends on legal principles; but, in determining these principles, the court is supposed to propound them, and can interfere in each case, to *direct* the trustees either before or after any formal decision on their part. It is not by way of review, but by way of direction or command, that the court interferes in such cases.

My conclusion is, that the distribution must be made in conformity with the views intimated by the trustees.

UNITED STATES CIRCUIT COURT.

EDWARD D. NELSON *et al.* agt. THE PROPELLER THOMAS SPARKS.

HENRY DENNY agt. THE SAME. ENOCH CHAMBERLAIN agt. THE SAME.

Where it appeared that the master of a propeller in attempting to pass on the larboard side of a tow-boat, with barges attached, after the tow had taken a sheer to the larboard, on the conjecture that the tow would break her sheer in time to allow of sufficient room in the channel for the propeller to pass on that side, and a collision ensued, by which the outside barge on the larboard side was sunk.

Held, that before the master of the propeller could rightfully or prudently act upon such conjecture, if he desired to persist in the course he had adopted in passing the tow, should have stopped his vessel until he had ascertained the result of the sheer.

New-York, September, 1859.

APPEAL from decrees against the appellant.

MR. VAN SANTVOORD and MR. NELSON, *for libelants.*

MR. STOUGHTON and MR. LEVERIDGE, *for appellant.*

NELSON, C. J. The libels were filed in these cases by the owners of the barge Eagle and the owners of her cargo, against the Thomas Sparks, to recover damages for a collision occurring between the two vessels in the Raritan River, New-Jersey, on the 22d of August, 1854. The Eagle was in tow of the New Boston, which was descending the river against the tide, with four barges or boats on each side of her, two abreast, and each having another towed astern. The Eagle was the forward outside barge on the larboard side, and was fastened by a hawser at her stem and stern to the barge next inside of her. The Thomas Sparks was descending the river astern of the New Boston and her tow, and, in attempting to pass her

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on the larboard side, struck the Eagle and sunk her. The channel was some two hundred and fifty feet wide at the place of collision, and both vessels were approaching a very abrupt turn in the river towards the north, that is, towards the left in descending. There were mud-flats on each side of the channel. As the New Boston was approaching this turn, being in about the middle of the channel, she suddenly took a lurch or sheer toward the left or larboard side, without having changed her helm, but from the effect of the head-tide acting upon the tow, which brought her obliquely across the channel, and brought the Eagle, she being the outside barge, and heavily laden, somewhat upon the flats, the draft upon which had the effect to produce a strain on her hawser at the bow, and broke the bolt of the cleet with which it was fastened to the inside boat; and from the advance of the tug swung the head of the Eagle, thus broken loose, round at right angles to the line of the other boats, and thus closed up the passage on the larboard side; and in this position she was struck by the Thomas Sparks, while in the act of attempting to pass on that side of the channel.

No fault is attributable to the New Boston, or to any of the barges or boats in her tow. And the only question in the case is, whether the collision occurred without any fault on the part of the Thomas Sparks?

The defence set up by the master is, that if the Eagle had not broken loose from her connection with the tow, and swung across the channel, the collision would not have occurred, as there was room enough for his vessel to pass clear of the tow; and that, when the accident happened to the Eagle, his vessel was so near that no manœuvre or movement could prevent the blow.

The master was a witness for the respondent. He states, that his vessel was about a quarter of a mile astern of the tow, when he made up his mind to pass it on the larboard. As he neared it, the tow sheered across the river toward the larboard side, rather out of the channel. "I calculated," he observes, "it would break the sheer, and still give us room to go on the

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larboard side. The tow came quartering to the larboard. We had not commenced turning the bend in the river. As we neared the tow, I saw it kept its sheer, and I then slowed my boat, and finally stopped her, and the other boat continued under way. As we stopped our boat, I let her go along until our bow lapped on to the stern of the tow, and I then discovered that the barge was swung out, and I rang to go back, and we backed her." At another place in his testimony, the master states, that the reason he did not go to the starboard was because he thought the tow would break her sheer, and he thought she would break it because he thought it would keep the channel.

No witness on the part of the respondent varies this account of the collision, as given by the master.

We are satisfied, upon a very careful examination of the evidence, and especially of that of the master, that if, when he discovered the sheer of the New Boston, he had ported his helm, his vessel could have passed the tow on the starboard side without any difficulty; and that it was his persistence in his first determination to pass to the larboard, after the sheer, that occasioned the disaster. There was abundance of room in the channel to have passed to the starboard. But, assuming that the Thomas Sparks was too near to have made this manœuvre at the time of the sheer, then it was the duty of the master to have immediately stopped and backed his boat. Instead of doing so, he admits, as he stopped, he let her go along until his bow lapped on the stern of the tow, before he rung the bell to back her.

The excuse given for persisting in passing to the larboard, after the sheer of the New Boston, is that he thought she would break it. But before he could rightfully or prudently act upon this conjecture, if he desired to persist in the course he had adopted in passing the tow, he should have stopped his vessel until he had ascertained the result of the sheer.

Without pursuing the examination of the case further, we are satisfied the decrees of the court below were right, and should be affirmed.

SUPREME COURT.

THOMAS RAE agt. PETER LAWSER.

Where the assignee of a judgment purchased it in good faith, relying on the statement of the defendant, that no part of it had been paid, when, in fact, a payment had been made by the defendant to the plaintiff before the assignment—*held*, that the defendant could not, as against the assignee, set up such payment as a discharge of so much of the judgment.

Nor could the defendant, on confession of a judgment to another creditor, enable the latter to attack the first judgment in the hands of the assignee on account of such payment.

Where the statement of a judgment on confession is defective, the plaintiff cannot avail himself by motion of the defects in the statement on which a former judgment by the same defendant was confessed to another plaintiff.

New-York Special Term, October, 1859.

MOTION in behalf of Samuel F. Righter, as a subsequent judgment creditor, to set aside judgment.

SUTHERLAND, Justice. Upon the question of fact referred to the referee to take proofs upon, whether the sum of \$700, or any other sum, was paid by Lawser upon the notes, to secure Rae's liability upon which the judgment was in part confessed, it is probable, on the proofs before him, the referee came to a correct conclusion, that as between Rae and Lawser, the parties to the judgment sought to be set aside, the \$700 paid by Lawser to Rae was not a loan, but in fact a payment on account of the notes, and operated as a payment of so much of the judgment.

But Rogers took the assignment of the judgment from Rae, and paid him \$1,250 for it, in good faith, without notice of such \$700 payment, or any other payment on the judgment, supposing no part of it had been paid; and before he took the assignment and paid his money, Rogers called upon Lawser, told him Rae was desirous of selling the judgment to him, asked Lawser if it was all right, and whether any part of the same had been paid; and Lawser in reply stated that the judg-

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ment was all right, that no part of it had been paid, and that the whole amount thereof was due.

These facts are not disputed, and there is no doubt that Rogers bought the judgment, and took the assignment and paid \$1,250, relying on such statements of Lawser.

Lawser could not, as against Rogers, set up the payment of the \$700, as a payment and discharge of so much of the judgment; nor do I think that he could enable Righter to attack the judgment in the hands of Rogers, on account of such payment, by confessing a judgment to him, Righter.

This motion, then, must be decided irrespective of the question of fact so referred to the referee, and of the proofs and the opinion of the referee thereon.

The statement, on which the judgment was confessed to Rae, is clearly sufficient, except as to the last note mentioned, dated March 28th, 1855, and the \$238.69 for moneys paid by Rae for Lawser, and the \$103.89 for goods sold and delivered by Rae to Lawser. As to these items, under the decisions, which are certainly conflicting, I should think the statement insufficient and defective. The amount for which the note was given is not stated, and the time or times when the goods were sold and delivered and the moneys paid is not stated. Nor is it stated to whom the moneys were paid.

But the statement on which the judgment was confessed by Lawser to Righter is equally, if not more, defective. In setting out the consideration of the notes, the time or times when the moneys were loaned, and the goods, &c., sold is not stated. (*Freligh* agt. *Brink*, 16 *How. Pr.* 273; *Chappell* agt. *Chappell*, 2 *Kernan*, 215; *Dunham* agt. *Waterman*, 17 *New-York Rep.* 9.)

The statement on which Righter's judgment was entered being defective, he cannot avail himself by this motion of the defects in the statement on which the judgment to Rae was confessed.

The motion of Righter must be denied with \$10 costs.

Laughran agt. One hundred and fifty-one tons of Coal.

UNITED STATES CIRCUIT COURT.

JOHN GAUGHIRAN agt. ONE HUNDRED AND FIFTY-ONE TONS
OF COAL.

A *delivery* of an article according to the terms of a bill of lading, and the taking possession of it by the consignee, under the expectation that the *freight will be paid at the time*, is not such a delivery as parts with the *lien* for the freight.

A delivery by a party must be made with the *intent of parting with his interest* in the property, or under circumstances in which the law will infer such an intent. The act of the party is characterized by the intent with which it is performed, either expressly or by necessary implication.

New-York, September, 1859.

THE bill was filed in this case to recover freight for the transportation of one hundred and fifty-one tons of coal.

BENEDICT, BURR & BENEDICT, *for appellant.*

BURRILL, DAVISON & BURRILL, *for appellee.*

NELSON, C. J. According to the bill of lading, the coal was to be delivered at Peck Slip, East River, to William Jarvis or his assigns, on payment of freight at \$1.85 per ton. The libel charges that the vessel arrived with the coal at the port of New-York, and notice was given to the consignee, who requested that it might be delivered at his place of business in the city (No. 59 Ann street), and agreed to pay for expense of such delivery at the rate of twenty-five cents per load; that the coal was delivered accordingly, in good order and condition, and the same was by him accepted and received; and that the consignee, notwithstanding he accepted and received the coal in good order and condition, refused to pay the said freight and expenses of delivery, although often requested.

An answer was put in, but it is not material to notice it, as the case was heard in the court below and in this court, upon the admission by the respondent, that the facts were as stated

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in the libel. We lay out of view the deposition taken and produced in this court, as not in time to be received and read as part of the proof.

The question presented is, whether or not, upon the case as made out in the libel, the libelant had parted with his lien upon the coal for the freight, by the delivery. If he has done so, he cannot pursue and attach it in admiralty, as still a security for the freight money. The respondent must defeat the claim, if at all, upon a dry point of law, as the case admitted assumes that the money is justly due to the libelant, and the rights of no third or innocent party exist or intervene.

Now, the mere manual delivery of the coal by the carrier to the consignee does not of itself operate necessarily to discharge the lien. The delivery must be made with the intent of parting with his interest in it, or under circumstances in which the law will infer such an intent. The act of the party is characterized by the intent with which it is performed, either expressly or by necessary implication. A delivery, therefore, of the article, according to the terms of the bill of lading, and the taking possession of it by the consignee, under the expectation that the freight will be paid at the time, is not such a delivery as parts with the lien.

I remember a class of cases where, by the bill of lading, the freight was to be paid on delivery, but according to usage the bills were not presented till two or three days afterwards, that the consignee might have time to ascertain the correctness of the shipment of the goods, and in which it was held, that, as between the parties, the delivery was conditional, not to become absolute till the payment of the money. It was otherwise where the rights of third parties intervened. These cases illustrate the principle above stated.

Now, as I understand the case, as presented in the libel, the demand of freight was made as soon as the coal was delivered, and the delivery was made under an expectation of such payment. According to the bill of lading, the coal was to be delivered at Peck Slip, but, by an arrangement between the parties, the place was changed to No. 59 Ann street. This

Maloney agt. Dows.

changed the mode of delivery ; instead of being delivered at the dock or the ship's tackle, it was delivered in carts, and when thus delivered, to the satisfaction of the consignee, the payment was demanded. This, I think, is the fair interpretation and understanding of the state of facts admitted, and in this view it is clear that the lien was not discharged.

As to the objection that the court below included in its decree the amount of the cartage across the city, it is not sustained, as will be seen by a reference to the decree itself. It allows the cartage to be deducted from any payments that may have been previously made. Whether any had been made, nowhere appears ; and if they had been, unless specially made upon the freight, the application to the cartage would have been unobjectionable.

Decree affirmed.

NEW-YORK COMMON PLEAS.

JAMES MALONEY agt. JAMES DOWS.

Where an *exception* is taken to the decision of the court granting a *non-suit*, and the court does not order that the case be sent at once to the general term, a motion for a *new trial* on such exception (before judgment) may be made at the *special term*. Such motions are embraced under the general head of motions for a new trial, in section 265 of the Code. (*As to the power of another judge to sit in review of such exceptions, see Ryle agt. Harrington*, 14 How. 59; and *Jackson agt. Fassit*, 17 How. 453.)

New-York Special Term, August, 1859.

DALY, First Judge. An order ought to have been made at the trial, directing that the exception taken to the decision of the court, granting the motion for a non-suit, should be heard in the first instance at the general term. The question was a new and an important one. It was very fully and elaborately argued upon both sides. The decision disposed of the whole

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of the plaintiff's rights, and it was, therefore, eminently proper to send the case at once to the general term, and to suspend, in the mean while, the entry of judgment. It was my impression that it was the general understanding of all parties at the time, that that course was to be taken, and it was certainly my intention to have made such an order. If it be doubtful whether I can make such an order now, a point that I do not feel called upon at present to pass upon, there is no doubt in my mind of the plaintiff's right to make a motion at the special term for a new trial, and as, unless the defendant wishes to have three arguments, a formal order denying a new trial will accomplish the same purpose as if the proper order had been made at the trial, I will confine myself to the examination of the question, whether there is any room for doubt as to a plaintiff's right to make such a motion, where he has been non-suited.

The remedy in a case of this kind, before the Code, was by a motion, founded upon a case or bill of exceptions, to set aside the non-suit, which was, in effect, a motion for a new trial, which would follow as a matter of course, if the motion was granted. (*Pratt agt. Hull*, 13 *Johns.* 334; *Packard agt. Hill*, 7 *Cow.* 434; *Wormouth agt. Cramer*, 3 *Wend.* 394; *Graham on New Trials*, 280, 282, 1st edition; *Graham's Practice*, 2d edition, 312.)

It was embraced in the class then known as enumerated motions, which was heard in this court by all the judges sitting in *banc*, every saturday, and in the supreme court the motion was heard in the first instance, before the circuit judge, unless he should direct that it be carried immediately before the supreme court. (*Laws of 1832*, p. 188; *Laws of 1833*, p. 395; *Hicks agt. Chamberlain*, 12 *Wend.* 254.)

If the party seeking the review wished to prevent the entry of a judgment, he obtained an order staying proceedings until the motion was heard and disposed of, but the motion might be made, though judgment had been perfected and execution issued, and, if granted, the court would order restitution. (*Laws of 1832*, chap. 128, § 1, p. 188.) If the motion was de-

nied, an appeal lay to the supreme court, from the decision of the circuit judge.

The Code has made no material change as to the course of procedure, where the object is to obtain a new trial. The application, by motion to the special term, in the first instance, except when the judge at the trial directs it to be heard in the first instance at the general term, is analogous to the former motion, before the circuit judge or before the judges of this court or of the superior court, and the appeal from the order granting or refusing the new trial is the establishment in the three courts of the practice, which, before the Code, prevailed only in the supreme court, while the appeal upon the law to the general term from the judgment is a substitute for the former writ of error. "There is no warrant in the Code," as was said by my late colleague, Judge WOODRUFF, in *Morgan agt. Bruce* (1 Code, R. N. S. 364), "for regarding a motion for a new trial as different, in any of its material incidents, from the like motion under the former system of practice." The effect and operation of the Code, as to the manner of obtaining a review, were very fully examined by this court in the cases of *Hastings agt. McKinley* (3 Code Reporter, 10), and *Morgan agt. Bruce, supra*, and as a very lucid exposition was given by Judge WOODRUFF, in the first of these cases, of the system that prevailed before, with the view of pointing out the exact effect and nature of the enactments of the Code, it will be sufficient to refer to his opinion for an exposition of the views of this court. Since those decisions were rendered, the sections then reviewed have undergone no change, except by the amendment of the 348th section in 1852, providing that an appeal, upon the facts as well as upon the law, might be taken to the general term, where the trial is by the court or by referee.

The motion for a new trial was a comprehensive remedy, where, for misdirection or the improper admission or rejection of evidence, a bill of exceptions was tendered, or where a demurrer to evidence was put in, or a non-suit was granted, or a case made to set aside a verdict as contrary to evidence. The design of the motion in all such cases was, to enable a party to

have a re-examination, without compelling him to resort to his writ of error, or anciently to his writ of attaint. It was a more simple, expeditious, and in some cases, where the court had the discretion to grant it or not, the only effectual remedy, and there is nothing in the Code showing any intention on the part of the legislature to restrict or abridge it, or to alter in effect the procedure by which this mode of review might be obtained. Formerly, the motion had to be made before the court in *banc*. The statute before referred to made an important change, by requiring, where a bill of exceptions was taken to a case made, demurrer to evidence put in, or motion made for a new trial, on the ground of newly-discovered evidence, that the matter should be first heard and decided by the circuit judge, and that from his decision either party might bring the cause to a hearing before the supreme court, by appeal. The case of referees was not embraced in this provision, and motions, to set aside their reports upon the merits and for a rehearing before them, were always made before the supreme court in *banc*. (*Graham agt. Milliman*, 4 How. 435.) In this court and in the superior court, the power to grant new trials was exercised as incident to their common law jurisdiction, as distinct tribunals (*Livingston's Mayor's Court Reports*, 1802, pp. 12, 14, 17, 92 and 103); and if a new trial was denied, the remedy was by writ of error to the supreme court from the judgment.

The Code made provision, in 1848, for the manner of review in a new mode of trial—the trial before the court without a jury—by providing for an appeal from the judgment entered upon the direction of a single judge to the general term. In 1851, this mode of review was applied to judgments entered upon report of referees, and in 1852 the general term was authorized upon such appeal to review questions of fact as well as of law. Except in this class of cases, there is no very material or substantial change in the course of procedure. Things are called by different names, but the Code is, in this part of it, but little else than a codification, and a more general extension of the system that was previously in use.

The 348th section allows an appeal upon the *law* to be taken

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from a judgment entered upon the direction of a single judge, but this cannot be regarded as cutting off the right which previously existed, of moving before judgment for a new trial, for errors of law, and substituting in its place an appeal to the general term from the judgment. Such a motion, it has been shown, could, before the Code, be made before a circuit judge, unless he ordered otherwise, and such motions are now embraced, in my judgment, under the general head of motions for a new trial in section 265, which are to be heard at the special term, unless the judge at the trial direct them to be heard in the first instance at the general term. It is urged that this section relates only to cases where a verdict has been rendered, and does not embrace the case of the granting of a non-suit. There is nothing in the section to warrant any such construction. It embraces every case where a motion for a new trial might have been made before, or, if there be any exception, it is limited to the cases of a trial by the court without a jury, and a trial by referees.

It is urged that the decision of the court, in granting the non-suit, involves purely a question of law, and that the only remedy which the plaintiff has is an appeal from the judgment entered upon that decision to the general term. That the 348th section, in allowing an appeal from a judgment entered upon the direction of a single judge, provides for, and was designed to embrace such a case. The meaning, however, of this part of section 348 is very plain. Every judgment that is entered, except in cases where it is entered upon the report of referees, or upon confession without action, or upon the decision of general term, or where the clerk is authorized to enter it upon the failure to answer, is by the 278th section a judgment entered upon the direction of a single judge.

Upon every such judgment so entered, an appeal lies upon *the law* to the general term, which appeal, as before remarked, is a substitute for the former writ of error, which brought under review only questions of law. Judgment upon reports of referees are included in the same provisions, so that upon all

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the judgments here enumerated, an appeal was to the general term upon the law.

In the language of the statute, it was from a judgment entered upon the direction of a single judge, or upon a report of referees "in all cases," thus giving the appellate tribunal (the general term) the same power of review in the case of judgment that was formerly obtained by means of a writ of error. This is entirely in consonance with the former system, and there is nothing, in any part of the section, indicating any intention on the part of the legislature to take away the right which previously existed, of moving for a new trial when a non-suit was granted, any more than any other case where a new trial might be moved for.

The provision in section 265, directing the manner in which the motion should be heard, and the provision that is made in section 349 for an appeal from the order granting or refusing a new trial, both as respects the manner of hearing the motion, the mode of appeal, the giving of security, &c., is in every essential particular the same practice that was previously in use by the supreme court (*General Rules*, 9 *Wendell*, 449; *Graham's Practice*, 2d edition, 640), and very plainly shows the design of the legislature. Changes have been created through the institution of special and general terms, particularly in this court and in the orphans' court, and from the provisions in relation to trials by the court and referees, and the provision authorizing the judge in his discretion to hear a motion for a new trial upon his minutes, during the term or circuit at which the trial was had, but beyond this there is nothing affecting the motion for a new trial.

If the order denying a new trial will not accomplish the same purpose as if the proper order had been made on the trial, then I will hear the parties further upon an application to have the order made now which should have been made at the trial.

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SUPREME COURT.

JOHN L. FARQUEHARSON agt. WOODMAN KIMBALL and others.

It is not necessary to serve an *affidavit* upon which an order in proceedings supplementary to execution is granted, with the order upon the judgment-debtor. (*To the same effect is Green agt. Bullard*, 8 How. 313; and *The Ulica City Bank agt. Buel*, 17 How. 498.)

Whenever there is sufficient reason to question the good faith of the return of an execution made before the expiration of the sixty days, and the sheriff acts manifestly upon the procurement of the party or his attorney, it should be held, that the remedy by execution has not been exhausted, and the party is not entitled to a supplementary order. (*Agreeing fully with the views expressed by Judge JOHNSON on this point, in Spencer agt. Cuyler*, 17 How. 157.)

The issuing of a second execution against a judgment-debtor and a levy by the sheriff under it do not prevent the issuing of an order in supplementary proceedings for the examination of the judgment debtor, and proceedings by the plaintiff under such order, where the first execution has been returned unsatisfied. And this is so, although there is a suit pending against the sheriff to test the question of title to the property levied upon.

At Chambers, September 20th, 1859.

THIS is an application pursuant to an order to show cause why an order supplementary to execution for the examination of Kimball & Mudge, two of the judgment-debtors, should not be discharged.

C. W. WHITE, *for plaintiff.*

B. J. BEACH, *for defendants.*

BACON, Justice. The original order was granted, on the 5th of September instant, upon the usual affidavits showing the rendition of judgment, the issuing of execution, and its return unsatisfied. The affidavit, on which the order to show cause was granted, sets forth that an execution was issued on the judgment, on the 3d of September instant, that under it a levy has been made upon some property claimed to belong to the

defendant Mudge, and that the execution still remains in the hands of the sheriff unreturned, a suit being now pending to test the question of title to the property levied upon.

The counsel for the defendants takes three exceptions to the validity of the order supplementary for the examination of defendants :

1st. Because no copy of the affidavit, on which the order was granted, was served with the order.

2d. Assuming that an execution had been issued prior to the one upon which the levy was made, no proper or legal return was made by the sheriff of that execution, or, if so, the order could not be obtained until the expiration of the sixty days the execution had to run.

3d. An execution having been subsequently issued upon the judgment, and still outstanding, and in the course of enforcement in the sheriff's hands, the plaintiff is not entitled to an order for examination under the first clause of section 292 of the Code. The only resort of the plaintiff in such case being an application under the second clause of that section, requiring the debtor to answer as to any specific property which he unjustly refuses to apply to the satisfaction of the debt.

I. The first objection is answered by the case of *Green agt. Bullard* (8 *How. Pr. Rep.* 313), which holds that a copy of the affidavits, on which the order supplementary is granted, need not be served with the order. (And to the same effect is the case of *The Utica City Bank agt. Buel*, 17 *How. Pr. Rep.* 498.)

It is, perhaps, unfortunate that provision has not been made for such service, since it seems eminently proper that the affidavit, which is the foundation of the order, should accompany it, and thus apprise the party of the ground of the proceeding, and enable him to avail himself speedily of any defect that may exist in the affidavit. But the Code has not provided for such service, save in the case of orders of certain kinds granted in actions, and this proceeding is not an action. This defect might, perhaps, be remedied by a general rule of the court, but, in the absence of such a rule, the objection is untenable.

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II. The second question made cannot, perhaps, fairly be urged on this proceeding. In the moving papers on the part of the defendants, nothing is shown in respect to the issuing or return of the first execution, as the application to vacate the order proceeds upon the ground of there being but one execution in the case, and that one being still in the hands of the sheriff. If this were the only fact in the case, the order must, of course, be discharged, since it can only be granted after the issuing and actual return of an execution. It became proper then for the plaintiff to show, as he has done, that an execution was, in point of fact, issued on the 19th of August, and that, on the 22d of that month, it was returned by the officer unsatisfied, and it was upon this issuing and return that the supplemental order was obtained.

The affidavit goes further, and states that the attorney for the plaintiff explicitly requested the deputy sheriff, to whom this execution was delivered, to call upon the defendants with the execution, and make an effort to collect it, and that a few days afterwards, on again applying to the deputy to know if he had done so, he replied that he had not, that he had already returned executions against the same parties to the amount of thousands of dollars, and it was of no use to call upon them, that they had nothing, and he had accordingly returned the execution unsatisfied.

That, upon the proper return of an execution unsatisfied at any time within sixty days after its receipt by the officer, an order supplementary to execution may be obtained, is settled by a general term decision in the 6th district, in the case of *Livingston agt. Cleveland* (5 How. 396), and in the superior court of New-York, in *Engle agt. Bonneau* (2 Sand. 679.)

These decisions are not dissented from by Judge JOHNSON, in the recent case of *Spencer agt. Cuyler* (17 How. 157), although he doubts, and it seems to me with some reason, whether the legislature ever intended to leave it to the sheriff to fix the return day at any time within the life of the execution as against the parties, and by statute only in favor of the sheriff in a proceeding against him to compel a return

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But this point must be deemed settled by the cases above referred to. The case of *Spencer* agt. *Cuyler*, however, does decide that, where a return of the sheriff is made at the solicitation and upon the request of the plaintiff or his attorney, before the expiration of the sixty days, such a return is to be regarded as the act of the party and not the official act of the sheriff, and supplementary proceedings founded upon such a return will be set aside. In this I entirely concur, and in this district we have had occasion not unfrequently to enforce this rule. It is not to be tolerated that a sheriff, by yielding to the solicitation, or in obedience to the appliance of a party desiring to secure an advantage over competing creditors, may fix different return days to several executions which may be in his hands at the same time, and thus enable one creditor to obtain a preference in reaching the equitable assets of his debtor. Wherever there is sufficient reason to question the good faith of a return thus made before the expiration of the sixty days, and the sheriff acts manifestly upon the procurement of the party or his attorney, it should be held that the remedy by execution has not been exhausted, and the party is not entitled to the supplementary order.

In this case there is a failure to show any such fact. On the contrary, the attorney directed the officer to call on the defendants and make an attempt to collect, and, although the return was made very soon after the issuing of the execution, it appears to have been in good faith, and from a persuasion on the part of the deputy sheriff, apparently well grounded from his prior experience, that the defendants really had nothing on which a levy could be made.

III. The third ground of objection has been argued with much zeal by the defendants' counsel, and, but for some decisions which appear to dispose of it, with a good deal of plausibility.

It is insisted that the mode of proceeding, instituted by the Code in section 292 *et seq.*, was intended to be a complete system in itself, and entirely to supersede the old order of things, which obtained when the same end which is now accomplished

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by these proceedings was attained through the aid of a creditor's bill, and the machinery appurtenant thereto. And, therefore, that, whenever there is an execution actually in the sheriff's hands, the party can only take the proceeding which, by the Code, is intended as auxiliary to the execution and in aid of its enforcement, and not one which, founded on the return of an execution, enables the party to go further and put the defendant in the execution upon a general, thorough and searching course of examination in respect to all his property, legal and equitable.

Under the former system, however, it had repeatedly been held by the chancellor, that after the filing of a creditor's bill, the complainant might issue a new execution upon his judgment, and levy upon the property of the judgment debtor, and proceed to enforce it to any extent that it might be found available, and was not called upon to elect either to dismiss his bill or abandon his execution; certainly not, unless it was made clearly to appear that the property levied upon was, without dispute, the property of the debtor, and was abundantly sufficient to satisfy the debt. The two modes of seeking satisfaction were not at all inconsistent with each other, but might proceed, *pari passu*, until one or the other resulted in satisfaction of the debt. This rule has been followed and the same principle applied in the case of *Lillindall agt. Fellerman* (11 How. 528), decided at a special term in New-York, and by the New-York superior court in *Sale agt. Lawson* (4 Sand. 718). Judge DURN, in giving the opinion of the whole court in this case, says, "These rules of the old court of chancery are just as applicable to the examination of a debtor under the Code, as to the proceeding by bill, and we are all of opinion that they must still be followed."

In the case now before me, the property levied upon by the second execution is not only not sufficient to satisfy the debt, but a suit is actually pending against the sheriff who made the levy, to determine the question of title to the property itself.

On the authority of these cases, I am constrained to hold that the proceeding, by which the order for examination suppl-

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mentary to the return of the first execution was obtained, was not superseded by the levy under the second execution, but that the plaintiff is entitled to proceed under it as a valid order.

The result is, that the order to show cause is discharged, the order of the 5th of September is retained in full force, and the defendants served with that order are directed to appear before the referee, and submit to an examination, on the 27th of September instant, at ten o'clock A. M., and abide such further order as may be made in the premises.

No costs of this application are allowed to either party.

SUPERIOR COURT.

ELIZUR HALL, respondent, agt. BENJAMIN B. MERRILL,
appellant.

It is not essential to prove that creditors subscribed a *composition deed* or agreement *after* the plaintiff in an action signed it, in order to give it validity.

A legal presumption may be allowed in the absence of distinct proof, that the execution was cotemporaneous by all, under one general influence and one general consideration, although the location of names on the paper might indicate a signing one after another.

It is a rule, that a debtor must strictly observe any conditions affixed by a creditor to his consent to a composition deed, where the conditions are expressed in the deed. But where a condition is not made in the deed, to wit: That the notes be delivered at a certain time, whether it is a violation of the contract between the parties, seems to depend upon the fact of the proffer of the notes being made within a reasonable time, and that question, with all its attendant circumstances, may be proper for a jury.

New-York General Term, October, 1859.

Present, HOFFMAN, WOODRUFF and PIERREPONT, Justices.

THIS case arose upon an appeal by the defendant from a judgment entered against him, for the sum of \$690.81.

The case was tried before Mr. Justice SLOSSON without a jury.

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The complaint stated the sale and delivery of goods by the plaintiff to the defendant at various times and in various parcels, between the 11th day of April, 1857, and the 26th day of March, 1858, amounting in the aggregate to the sum of \$577.82, for which sum, with interest on the amounts respectively, as the several periods of credit expired, judgment was prayed. All the sales, except one for \$5.25, were made before the 26th day of October, 1857. This one was made the 26th day of March, 1858.

The answer denied every allegation of the complaint except as thereafter admitted or avoided.

It is then averred, that on the 15th day of December, 1857, the plaintiff executed and delivered, together with other creditors of this defendant, a certain instrument in writing under his hand and seal, of which the following is a copy :

"Whereas, in consequence of sundry losses and misfortunes, Benjamin B. Merrill has become unable to pay his debts in full, we, the undersigned, in consideration of one dollar to us in hand paid, receipt of which is hereby acknowledged, agree to receive, in full payment and settlement of our respective claims against him, his three notes, for equal amounts, at six, nine and twelve months, from January first, 1858, at forty cents on the dollar.

In witness whereof, we have hereunto set our hands and seals this 15th day of December, 1857.

ELIZUR HALL, [L.S.]

The answer then states the execution of three promissory notes, each for \$70.18, at six, nine and twelve months respectively, dated the 1st day of January, 1858, to the order of the plaintiff, the proffer of such notes to him. The notes were made and executed on the 1st day of February, 1858.

There is an averment that these notes were given for the composition of the demands mentioned in the complaint, and that the action for the same is thereby barred.

A set-off, as to the \$5.25, the purchase of the 26th day of March, 1858, is then set forth.

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In another part of the answer it is averred, that the instrument aforesaid was signed by the plaintiff, and eleven other persons or firms, the creditors as aforesaid of said defendant, relying upon the good faith of both plaintiff and defendant, in carrying out the terms of such agreement, as far as they were respectively concerned. He avers his willingness to carry out the agreement.

The answer seeks affirmative relief in the following manner: Wherefore, this defendant demands judgment against the plaintiff that the said agreement in writing be specifically performed; that the plaintiff be adjudged to receive the three notes in satisfaction of his claims, and the money upon such as have fallen due; that he be perpetually restrained from commencing any action upon such claims, or from assigning or disposing of the same, and that the defendant may have such further relief as the nature of the case may require.

The plaintiff, by way of reply to the counter-claim for equitable relief, denied each and every allegation in that part of the answer, except as thereafter admitted. He admitted the execution of the composition deed, but setting up that he was induced to do so by false and fraudulent representations as to losses, insolvency, &c. That the defendant had engaged to have all his creditors sign the deed, and it was to be of no effect without this being done; none were to be paid over forty cents on the dollar; that all have not signed such deed, but, on the contrary, a portion of them have refused to sign it, and some of them have been paid their demands in full, and that some, who did sign, have, under promise to that effect, been paid their demands in full.

The only evidence given upon the trial was, that of the plaintiff, upon his own examination. He proved the representations of the defendant as to his situation, but entirely fails to show any falsehood or fraud in them. No evidence is found to sustain any other of the allegations as to deceptive or fraudulent conduct or statements on the part of the defendant. He proved that one or two other creditors had signed the composition deed before he signed it himself.

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He also states that the notes mentioned in the deed were to be delivered at least as early as the 1st day of January. They were tendered about the middle of February.

The question was put to the witness by the court, whether there was any, and if any, what consideration for his signing the composition deed?

An objection of the defendant's counsel was overruled, and an exception taken. The witness answered, there was none, except his promise to pay the notes.

The plaintiff having rested, and the defendant offering no testimony, the learned judge found as follows:

First. That the release set forth in the pleadings was executed without any consideration moving from the defendant to the plaintiff, except the promise to give the notes referred to in the pleadings on the first of January, 1858.

Second. That the release was signed by the plaintiff on or about the 15th day of December, 1857.

Third. That the said release was signed after two or three other creditors of the defendant had signed the said release.

Fourth. That the defendant bought the goods at the times, and for the prices, charged in the complaint.

Fifth. That the defendant tendered the notes to the plaintiff, required by the release, on or about the middle of February, 1858, and not before.

Sixth. That when the first note became due, the defendant tendered the plaintiff the amount of money due thereon, which the plaintiff offered to receive and apply on the general account, but not as a fulfilment of his (defendant's) agreement, but which defendant refused to pay for that purpose, or on that understanding.

And the court found as a conclusion of law upon the foregoing facts:

That the release is no bar to the plaintiff's recovery herein—to which conclusion of law and ruling the defendant's counsel then and there excepted, and the court thereupon ordered judgment for the plaintiff for the sum of six hundred and six dollars and ninety cents, with the costs.

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Judgment being entered in conformity with this decision, the appeal of the defendant was taken therefrom.

E. W. DODGE, *for appellant.*

MR. STEWART, *for respondent.*

By the court—HOFFMAN, Justice. The subject of the nature and legal operation of composition deeds was considered much at length in the case of *Renard agt. Fuller*, in January, 1859, before the general term of this court. The action was upon promissory notes given in the course of business, and the defence was a composition instrument, as follows:

"We, the undersigned, creditors of the firm of Fuller, Hart & McCorkle, in consideration of the sum of one dollar to each of us paid, agree to accept the sum of sixty cents on the dollar, in three notes at six, nine and twelve months, from the first day of February, 1857, without interest, in full satisfaction of our respective claims against said Fuller, Hart & McCorkle.

"All claims to be put on the same basis, and considered as due on the first day of February, 1857, by allowing or deducting interest, and the original notes are to be held as collateral, until the notes given in compromise are paid.

"Dated, January 6th, 1857."

Creditors to a considerable amount had signed before, and creditors to a large amount had signed after the signature of the plaintiffs. The liabilities were about \$225,000, and the whole amount of the demands of creditors who signed was \$87,000.

It was held that there was nothing, in the instrument or evidence, to show that the signature of the plaintiffs was upon any condition that all should sign. And it was held that the composition instrument was a bar to the action. The basis of the doctrine is, the relinquishment to the debtor, by others who sign, of a part of their claims, or the concession of some modification of the right to enforce them. This constituted the consideration. This existed without any clause of a mutual

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agreement between each other, as well as with the debtor, which was found in several of the cases. The implication of such a contract between themselves was raised, and was equivalent to its being expressed.

The English and American authorities were examined, and the result, as stated by Baron PARKE, in *Norman agt. Thompson*, was recognized. "An agreement by two or more of the creditors unconditionally to enter into a composition is perfectly good and binding as to those parties, whether the others do so or not. The agreement by each individual to give up part of his claim is a sufficient consideration."

In the present case, it is not proven that more than two or three creditors signed the instrument at all. It is found by the judge that two or three signed before the plaintiff signed. It is not shown that any signed afterwards. It is true that the answer states that the plaintiff and eleven other persons or firms, creditors of the defendant, signed the instrument. And to the fourth clause of the answer, which contains this averment, a reply was put in, although the answer was sworn to in July, 1858. But, as before stated, this part of the answer is by way of counter-claim asking for affirmative relief, by compelling the plaintiff to take the notes in full discharge of his demand. The reply, however, denies every allegation in this part of the answer contained, except as thereafter admitted.

I apprehend, then, that even assuming a reply was necessary, yet under the 158d section of the Code, the allegation, as to the number of creditors who signed, was put in issue. The general denial was sufficient. The release itself does not appear to have been given in evidence.

We think, however, that enough appears in the case to bring it within the scope of the rule laid down in *Renard agt. Fuller*, before referred to. We do not think it essential to prove that creditors subscribed a composition deed or agreement after the plaintiff in an action signed it, in order to give it validity. If so, it would not be binding upon a last signer, and its efficacy in each case might depend upon parol testimony of the time of execution. A legal presumption might well be al-

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lowed, in the absence of distinct proof, that the execution was cotemporaneous by all, under one general influence, and one general consideration, although the location of names on the paper might indicate a signing one after another. But in that view, proof of the actual time of execution, even if admissible, is unimportant.

The next question is, whether the fact of the non-delivery of the notes until the middle of February, was such a breach of a condition of the composition deed as to exempt the plaintiff from its obligation?

The plaintiff was permitted to prove this fact, and also that the notes were to be delivered as early as the first day of January, without objection.

The instrument itself only prescribes, that the notes were to be at six, nine and twelve months, from the first day of January, 1858. No time for the delivery of the notes is expressed in it. The implication may be reasonable that the first day of January was to be the period of delivering the notes, and their reception then may have been of moment for the business purposes of the plaintiff. Yet it is clearly not made a condition in the instrument, and whether it was a violation of the contract between the parties seems to depend upon the fact of the proffer being made within a reasonable time, and that question, with all circumstances bearing upon it, may be proper for a jury.

In a case decided in general term, 1857, the rule, that a debtor must strictly observe any conditions affixed by a creditor to his consent to a composition, was recognized, and applied when the condition was expressed, that a certain amount of claims should be signed off, on the same terms, by a specified period. It was not done, and the creditor was held not bound, although a short time elapsed after that day before it was accomplished, and no special injury was shown.

The cases referred to by Justice COWEN, in *Fellows agt. Stevens* (24 Wend. Rep. 292), were of this character. The instruments of composition contained stipulations or clauses amounting to conditions precedent. See *Oughton agt. Trotter*, (2 Nev.

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and Man R. 71), where LITLEDALE, Justice, takes the distinction above noticed, that in common cases of agreements to take composition, the debtor has a reasonable time to give the notes; but in that case it was stipulated they should be given in fourteen days.

We think there was error in the conclusion of law of the learned judge, in giving judgment for the amount of the original debt. This view renders it unnecessary to consider the propriety of the question put by the court.

There must be a new trial, with costs to abide the event.

SUPREME COURT.

HENRY C. LOCKWOOD agt. JOHN VAN SLYKE.

Where in an action the facts are such that an order of arrest might have been obtained, an execution against the person may be issued, although neither the record shows such facts, nor an order of arrest has been obtained.

And such execution may be issued *without application to the court*. The Code has made no provision for applying to the court or judge for leave to issue such execution. (*It will be seen that this decision is adverse to that of Humphrey agt. Brown, 17 How. 481.*)

Erie Special Term, May, 1859.

QUESTION submitted to the court on the following brief.

W. A. MELOY, *for plaintiff*.

Of the right to issue execution against the person in the cases comprehended in section 179 of the Code.

Although the record shows no ground for either execution against the person or for arrest, yet, if order for arrest has been granted and not vacated, such execution may be issued without application to the court. (*Cheney agt. Garbutt, 5 How. 487.*)

When the record shows a case within the scope of section

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179, although no order for arrest has been obtained, nor application to the court made, such execution may be issued. (*Marten agt. Scovill*, 6 How. 315.)

And *ex obiter dictum*, Mr. Justice HARRIS, in this case, as well as in *Field agt. Morse* (7 How. 16), intimates that even if neither the record shows the action within section 179, nor an order for arrest has been obtained, yet, without application to the court, execution against the person may be issued, if the case really be one wherein under said section "arrest might have been made," with regard to which fact, the party issuing the execution acts at his peril. For, if the case be not such a one, he thus renders himself liable for false imprisonment, and motion also may be made to set aside and vacate the execution against which he must, to the satisfaction of the court, by affidavits, establish the proper grounds to justify the imprisonment.

The court of appeals, in *Corwin agt. Freeland* (2 Seld. 560), held with *Cheney agt. Garbutt*, and left the question alluded to by HARRIS, Justice, in the last two cases, still *vexata questio*. *Alden agt. Sarson* (4 Abb. 102) decides contrary to the opinion of Judge HARRIS, that the execution cannot be issued without the order of the court, when the record does not approve of it, nor has order of arrest been granted.

For practice prior to the Code respecting *ca. sa.*, *vide Graham's Practice*, page 411.

MARVIN, Justice. I have examined the question submitted. The Code has made no provision for *applying to the court or judge* for leave to issue a *ca. sa.* If the right exists in this case, it is without reference to any order, and the plaintiff may exercise the right. He will act, however, at his peril.

NEW-YORK PRACTICE REPORTS.

Pharo and others agt. Smith and others.



UNITED STATES DISTRICT COURT.

JOSEPH PHARO and others agt. GEORGE SMITH and others.

In an action *in personam*, the defendants are guilty of no wrong or irregularity in tendering their appearance and pleading to the action, if the libelants choose to accept them, without first giving the securities for costs appointed by the course of practice. Those securities are a privilege to the opposite party which may be waived, without impairing the validity of any after steps in the proceeding.

Therefore, where the libelants proceeded for a series of months, conducting a sharp controversy upon a large demand, to a final decree (from which the defendants had brought an appeal), with the fact patent upon the minutes of the court, that the defendants had not taken the preliminary step to file a stipulation in the cause, before making answer or offering proofs,

Held, that they must thereby be deemed in law to have waived a claim to that act as a condition to the right standing of their adversaries in court. All the obligations of the defendants to the libelants as to the manner of conducting the cause were merged in the final decree.

New-York, October, 1859.

MOTION by libelants that defendants file *nunc pro tunc* a bond or stipulation for costs.

I. T. WILLIAMS, *for libelants.*

BENEDICT, BURR & BENEDICT, *for respondents.*

BETTS, J. This action *in personam* was commenced in November term, 1855, and alias process was returned in February term, 1856, personally served upon the defendants. They appeared and filed their answer to the libel August 16th, 1856, and, as it appears by the files of the court, the suit continued in prosecution to June 18th, 1859, when a final decree was rendered in favor of the libelants on the confirmation of the commissioner's report, after exception heard thereto, for the sum of \$10,500 damages, and \$397.37 costs.

On the 28th day of June, the defendants filed a notice of appeal in this court, giving the same day a notice thereof in writing to the proctor of the libelants. On the 19th of July, there-

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after, the libelants obtained an order staying proceedings on the appeal, until a decision upon the motion then noticed, that the defendants file *nunc pro tunc* a bond or stipulation for costs in the main action, should be made by the court. Any further movement upon that notice has been delayed from time to time, by mutual assent between the parties to the present period. The application is now supported by the affidavit of the proctor of the libelants, that the defendants gave no bail or stipulation in the action when the process was served, or at the time they appeared and answered, nor since, and that the defendants are now about to appeal the said cause to the circuit court, and that the proctor is informed and believes the defendants are insolvent, having since the judgment and decree was rendered in this cause put their property out of their hands, and that the proctor further believes the libelants are wholly remediless against the defendants for either the damages or costs recovered against them in this court, and that he always supposed and believed that the usual bond and stipulation for costs, with sufficient sureties, had been duly filed by the defendants in this court at the time they perfected their appearance in the cause, and never knew or suspected the contrary until after the decree therein was docketed on the 8th of July last.

The proposition on the part of the libelants is, that the defendants have been guilty of malpractice and a dereliction of duty in omitting to give bail to the marshal, or to file a stipulation to cover the costs of the action at the time of their arrest, or on filing their appearance or answer in the action, and that they are legally bound now to place the libelants in the same condition as if that duty had been fulfilled at the inception of the cause. This, I think, is a misapprehension of the rules and principles of practice.

The defendants were guilty of no wrong or irregularity in tendering their appearance and pleading to the action, if the libelants chose to accept them, without first giving the securities appointed by the course of practice. Those sureties are a privilege to the opposite parties which may be waived by

those entitled to exact them, without impairing the validity of any after steps in the proceeding. Indeed, the elementary books impose on the actor in the suit the obligation of coercing his antagonist, by special mandates of court, to supply in time the suretyships which the due order of practice ordains for the guarantee of his demands or costs involved in the suit (*Clarke's Practice*, title 9, *Dunlap's Pr.* 145); and when he omits to exact the compliance of his adversary with rules affecting his particular interest, the presumption should be that he intends to waive the obligation, it being merely his personal privilege.

In this instance, the libelants proceeded for a series of months, conducting a sharp controversy upon a large demand, with the fact patent upon the minutes of the court and before their face, that the defendants had not taken the preliminary step to file a stipulation in the cause, before making answer or offering proofs, and they must thereby be deemed in law to have waived a claim to that act as a condition to the right standing of their adversaries in court. All the obligations of the defendants to the libelants, as to the manner of conducting the cause, were merged in the final decree.

The claim, to have the defendants compelled, at this day, to furnish the security for the costs which accrued, does not rest upon any purposed act of the defendants proposed to be yet done by them in this cause within this court. They call for no further action or favor in their own behalf, in the district court, in the case. The powers and aid of a different and higher tribunal are now invoked, and the remedy of the libelants, if any they have, must be in that forum, to screen themselves against further charges on account of the action in its subsequent stages. The case is fully ended in this court, with the exception of the right of the libelants, at its hands, to execution of the decree here rendered, if that be not transferred by the appeal to the circuit court.

The libelants make no equity, after the litigation is wholly ended here, to have the defendants compelled to give the stipulation or bond, not exacted at the commencement of the suit,

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if it be competent to the court at this stage of the case to grant such application. There would be equal fitness, if not a greater propriety, in a defendant demanding, after final judgment in a cause, that a plaintiff be called upon to supply security for costs which was not imposed upon him, as it might have been at the election of the defendant before he proceeded in the cause. The court interposes its powers to hold parties to the observance of its rules who are watchful over their rights, and does not break up a completed course of practice pursued without fraud or deception on one side, when the other has slept over the proceeding with every opportunity to object to it and have it rectified if erroneous.

The motion is denied.

NEW-YORK SUPERIOR COURT.

GEORGE C. & E. J. GENET agt. MARY E. FOSTER.

Where a person by his last will and testament bequeathed a certain sum to his executors, in trust to invest the same and apply the income thereof to the support of his daughter, M. E. F., during her natural life, and subsequently died, leaving such will in force and unrevoked, and the same was duly proved, and the executors named duly entered upon their duties as such; it was held, 1. That a judgment and execution creditor of the *cestui que trust*, who, in proceedings supplementary to execution, had procured a receiver of her property to be appointed, could not have the question determined in such proceedings, whether the whole income of the fund was necessary for her support, and whether any, and if any, how much of such income should, as a matter of equity, be applied and paid upon such judgment.

2. That question can only be determined by an action, in which the judgment-debtor and the trustees are parties.
3. A receiver of the property and effects of a judgment-debtor, appointed in proceedings supplementary to execution, is not, by the more force of his appointment, vested with a title to the interest of such judgment-debtor as *cestui que trust* in the income of a fund, which by 1 R. S. 777, § 2, and *ibid.* 729, § 63, is inalienable by such *cestui que trust*, although prior to such appointment income may have accrued, and be in the hands of the trustees unappropriated, when such appointment is perfected; nor will his appointment, by its own force, vest in him the title to her interest in the income which may accrue subsequently thereto.

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4. Where, after a receiver had been so appointed by a judge of the court of common pleas, the same person was, in like proceedings in an action in the superior court also appointed by a justice thereof a receiver of the property of the same judgment-debtor, and where, between the time of making said appointments, unappropriated income from such a fund had accrued, and been paid into the hands of such receiver by order of the judge by whom he was first appointed; it was also held, that a petition by the creditor by judgment in the superior court, that such unappropriated income be paid and applied on his judgment, by said receiver, was properly denied.

Before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF, PIERREPONT and MONCRIEFF, Justices.

Heard April 21st.—Decided April 28th, 1859.

THE plaintiffs appeal from an order made in this action, on the 12th of March, 1859, denying a motion made by them for an order, that Malcolm Campbell pay to them, upon a judgment which they have recovered in this court against said Mary E. Foster, \$650, which said Campbell received as a receiver of the property and effects of said Mary E. Foster.

A. T. Stewart & Co., on the 3d of December, 1856, recovered a judgment in the New-York common pleas, against Mary E. Foster for \$3,031. An execution on said judgment was duly issued and returned unsatisfied. Thereupon, on the 15th of April, 1857, an order was made by a judge of that court, in proceedings supplementary to execution, requiring her to appear and be examined concerning her property. On the 9th of June, 1857, an order was made by a judge of that court, appointing Malcolm Campbell, Esq., a receiver of all her property and effects.

On the proceedings had prior to the appointment of such receiver, it was shown that the father of said Mary E. Foster (then deceased), by his last will and testament, bequeathed \$30,000 to his executors, in trust, to invest the same, and apply the income thereof to the support of said Mary E. Foster during her natural life, and that A. L. Hoguet and A. G. Getty had been appointed trustees, under the will, of said fund.

On the 9th of June, 1857, the judge, who appointed such receiver, also made an order that said trustees pay all subse-

quently accruing income from the said fund, and the income then accrued, over and above the annual sum of \$800, to A. T. Stewart & Co., or their attorney, upon their said judgment.

On an appeal from that order, to the general term of the court of common pleas, that court, on the 5th of December, 1857, modified the order appealed from, and directed that any interest of, or income from the \$30,000 which the trustees had received prior to the 9th of June, 1857, and not paid over by them to Mary E. Foster, be paid by them to said receiver, "to be applied by him on account of said plaintiffs' (A. T. Stewart & Co.'s.) judgment in this action."

It also restrained the trustees from paying, or Mary E. Foster from receiving, from subsequently accruing income, more than \$800 per annum, to the prejudice or injury of A. T. Stewart & Co., until said receiver should commence an action (or until the further order of the court), "against the trustees and Mary E. Foster, to compel the application of said income and interest derived from the said trust-money, to the payment of the plaintiffs' judgment in this action." If the action was not brought in thirty days the injunction was to cease—except as to income accrued prior to the 7th of June, 1857, and not paid over—such an action was commenced, and the complaint on the hearing of it was dismissed.

Between the 9th of June, 1857, and the 5th of December, 1857, the fund of \$30,000 produced an excess of \$650, over the sum of \$800 per annum. The \$650 was paid pending said appeal, to the attorney of A. T. Stewart & Co., and after the aforesaid appeal was decided, he paid it back to the said receiver.

On the 18th of February, 1858, the Messrs. Genet recovered a judgment in this court, against Mary E. Foster, for \$616.07. An execution was issued on that judgment and returned unsatisfied. Thereupon proceedings supplementary to execution were instituted in that action, before a judge of this court, who by order, dated the 25th of March, 1858, appointed said Malcolm Campbell a receiver of the property and effects of said Mary E. Foster, in the last said proceedings.

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The Messrs. Genet allege that the \$650, so received by Campbell, receiver, as aforesaid, accrued after the 15th of April, 1857, and prior to the institution of supplementary proceedings by them.

The petition of the Messrs. Genet, on which the motion was made, which resulted in the order of the 12th of March, 1859 (the order appealed from), was sworn to on the 10th of February, 1859.

Malcolm Campbell, in opposition to the motion, in his affidavit of the 18th of February, 1859, deposes that he has paid the \$650 to the attorney of A. T. Stewart & Co., on his demand of the same. (It was paid to Campbell a day or two prior to the 10th of December, 1857.)

Mr. H. Hilton, the attorney of A. T. Stewart & Co., made affidavit that he received September 23d, 1857, as surplus of income accruing August 1st, 1857, \$825. And, on the 4th of December, 1857, as surplus of income accruing November 1st, 1857, \$325.

That, upon the decision of the general term of the common pleas (before referred to), he paid the \$650 to said receiver "to be applied by him on account of such judgment, it being income then remaining unpaid to Mary E. Foster."

That the same has been so applied. On the 9th of February, 1859, said receiver paid to him, as attorney of A. T. Stewart & Co., \$620, claiming the right to retain the other thirty dollars "for commissions, expenses, &c.," and on the 11th of February the said receiver also paid the \$30 to said attorney.

(Mary E. Foster was married about the 25th of April, 1858, to Charles E. Whittlesey.)

The matter in controversy, irrespective of objections taken to the validity of the various proceedings, is simply this:

Malcolm Campbell, on the 9th of June, 1857, on proceedings supplementary to execution, instituted by A. T. Stewart & Co. against Mary E. Foster (on the 15th of April, 1857), was appointed receiver of the property and effects of said Mary E. Foster.

Said Campbell was also appointed a like receiver, on like

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proceedings, at the suit of George C. & E. J. Genet, against said Mary E. Foster, on the 25th of March, 1858.

The first appointment was made by a judge of the New-York common pleas, and the second by a judge of the superior court. Campbell received, between the 1st of August and the 1st of December, 1857, \$650, income from a fund bequeathed by the father of said M. E. Foster, to his executors, in trust, to apply the income to her support during life—\$325 of such amount accrued August 1st, 1857, the other \$325 accrued November 1st, 1857.

Was it competent for a judge out of court to determine, on the motion on which the order appealed from was made, whether A. T. Stewart & Co., or George C. & E. J. Genet were entitled to this \$650, or to direct the receiver to pay it to the latter, upon their judgment against Mary E. Foster?

G. C. & E. J. GENET, *in person*.

A. R. LAWRENCE, *for Mary E. Foster*.

By the court—BOSWORTH, Ch. J. The interest of Mary E. Foster in the unaccrued income of the fund, held in trust by *Hoguet and Getty*, is inalienable by her. (*Chute agt. Bool*, 8 *Paige*, 83; 1 *R. S.* 773, § 2; *id.* 729, § 63.)

The appointment of a receiver upon a creditor's bill will not, *per se*, vest in the receiver a title to such income, though income may have accrued in the hands of the trustees prior to such appointment, and be in their hands when such appointment is made. (*Degraw agt. Clason*, 11 *Puige*, 136; 2 *R. S.* 174, §§ 41, 42.)

It can only be determined by *action* whether all of such income is necessary for the support of the judgment-debtor (the *cestui que trust*), and whether so much as may be unnecessary for her support, shall be paid to her judgment-creditors. (*Sillick agt. Mason*, 2 *Barb. Ch. R.* 79.) Not only the debtor, but the trustees, must be parties to such action, that the judgment which shall be given may protect them in making payments of parts of the income to the judgment-creditor of the *cestui*

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que trust; and that they, as the parties having the legal title to the property in question, and charged by law with the duty of applying the income of it to the support of the judgment-debtor, may be heard upon the question, whether an application of the whole is essential to a proper performance of their duty? (*Scott agt. Nevins, 6 Duer, 672, and cases cited above.*)

The receiver appointed by the order of the 9th of June, 1857, was not, by virtue of his appointment, vested with the title to any income that might accrue subsequent to that date. The \$650 which he subsequently received, and which forms the subject of the present controversy, accrued after the appointment of the receiver made on the 9th of June, 1857.

As we construe the order of the 9th of June, 1857, and the order modifying it, made on the 5th of December, 1857, A. T. Stewart & Co. were required to proceed by an action (to be commenced within thirty days), to the end that it might be determined in such action whether they, as judgment-creditors of Mary E. Foster, should be permitted to receive, upon their judgment, the excess of the income over and above \$800 per annum, that might accrue after the 9th of June, 1857, or any, and if any, what part of the income of the said fund?

It appears that such an action was brought, and that the complaint upon the hearing of the action was dismissed. The order of the 5th of December, 1857, contains no direction what shall be done with the excess of income over \$800 per annum, which may have been paid to the receiver between the 9th of June, 1857, and the dismissal of such complaint, unless the construction be claimed, that it directs such excess of income, in the hands of the receiver at the time of its date, to be paid to A. T. Stewart & Co.

In that condition of things, Campbell was appointed a receiver in the action in this court, on the 25th of March, 1858. The motion of the Messrs. Genet, that the receiver should pay the \$650 alleged to be in his hands, and received by him, as has been stated, was properly denied, because,

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1. The judge of this court, before whom the supplementary proceedings were pending, had not determined, even if he had the power to pass upon the question, that the whole income was not necessary to the debtor's support.

2. The receiver was not a debtor to Mary E. Foster, in respect to the \$650 in his hands; nor was the money in his hands her property. The legal title to it, except so far as such title may have been modified or affected by the orders of June 9th and December 2d, 1857, was in the trustees; and the duty of applying it to her support was confided to them by law, and would continue, until by the judgment of some competent tribunal it had been taken from them as unnecessary to her support, and had, by such judgment, been specially appropriated. It is only "property of the judgment-debtor" which, by section 297, a judge can order to be applied towards the satisfaction of the judgment.

We do not intend to deny if income had accrued and was in the hands of trustees, which they *conceded* to be unnecessary for her proper support, that so much of such accrued income as they conceded to be unnecessary for that purpose might not be applied by an order of a judge, made in the supplementary proceedings. But this appeal does not present any such question, and we are not, therefore, called upon to express any opinion in relation to it.

3. Whatever may have been the interest of Mary E. Foster in the \$650 in question, it appeared, upon the motion on which the order appealed from was made, that the receiver, as such, claimed an interest in the money adverse to Mary E. Foster, and made such claim by virtue of his appointment of the 9th of June, 1857; and the orders of the 9th of June and the 2d of December, 1857, denied that he was her debtor in respect thereof, and also claimed that, by virtue of the order of the 9th of June, 1857, under which he received it, and the order of the 2d of December, 1857, it was his duty to pay it to A. T. Stewart & Co.; that they claimed to be entitled to it by force of such orders, and that under such claim he had paid it to their attorney. Under such circumstances, the motion

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should have been denied. Section 299 of the Code does not authorize a judge to direct, by order, that money held by a third person, and in respect to which such adverse claims are made, shall be paid over by such third person to a judgment-creditor, who is seeking to reach it.

4. The money in question did not come to the hands of Campbell by virtue of his receivership, derived from his appointment by a judge of this court. When appointed receiver by a judge of this court, he held the money as a receiver appointed by a judge of the court of common pleas, and had received it by virtue of the orders of June 9th and December 2d, 1857. His appointment by a judge of this court, as receiver of all the property and effects of Mary E. Foster, would not, by its own force, have vested in him any title to the moneys, had they then been in the hands of the trustees. (*De Graw agt. Clason*, 11 *Paige*, 136.) It is difficult to see how the fact, that, by order of a judge of the court of common pleas, such moneys had been paid by the trustees into the hands of the receiver, to abide the result of a suit to be brought to determine whether they should be applied otherwise than as the trust requires, and which suit was pending when they were paid to him, can give the receiver, as a receiver appointed by a judge of this court, any title to or power over them, which such appointment would not have conferred, had the moneys at the time it was made been in the hands of the trustees unappropriated.

It is not the duty or province of the court to undertake to advise the remedy to be pursued, to determine whether the Messrs. Genet, as between themselves and Mary E. Foster, or as between themselves and A. T. Stewart & Co., are equitably entitled to the money in question, or whether it may be recovered of Mr. Campbell in an action brought for that purpose by her present trustees.

Entertaining these views we have expressed, we have not deemed it necessary to consider the objections taken to the validity of the proceedings, on the part of the present plaintiffs, supplementary to execution, nor to the order appealed from

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as being an order made at special term, and not by a judge of the court, out of court.

We think the order appealed from is not erroneous, and it is, therefore, affirmed, with \$10 costs.

SUPREME COURT.

JAMES HILLS agt. ETHAN STILLMAN.

Where a plaintiff claims to recover the *contract price* of an article, and by the contract he is bound to make the article in a *good workmanlike manner*, in order to make out his cause of action, he must show that he has thus performed the contract. Because, he cannot legally show what the price is without proving the contract and putting it in evidence; and then he is bound to show performance on his part.

Therefore, the defendant does not, by selling the contract to a third person, part with his right to show, when sued for the contract price, that the article is not such as the contract bound the plaintiff to make for him. And this defence may be interposed, although the plaintiff sues as the assignee of his co-partner, who were the original parties to the contract.

Where the evidence sustains such defence, it is not necessary that the court should pass upon the question, that the *acceptance* of the article by the defendant estops him from claiming that it was not made in a good workmanlike manner.

Where it appeared that the plaintiff and his co-partner entered into a written agreement with the defendant, to manufacture 20,000 forks in a certain manner, the defendant to furnish the material and pay a certain sum for the labor; and at the same time it was agreed between the parties that 1,500 forks then made, which the plaintiff and his co-partner had on hand, should apply and be received by the defendant on the written contract, and the defendant should pay a certain sum for the steel from which said 1,500 forks were made,

Held, that the agreement by the defendant to pay for the steel for the 1,500 forks was not a separate and independent agreement, but was part of his agreement to receive the said 1,500 forks upon the written contract, and so connected with the latter that the advances that were made by the defendant generally upon the written contract should be deemed payments for the steel until it was paid for.

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Otsego General Term, July, 1859.

Present, MASON, BALCOM and CAMPBELL, Justices.

APPEAL by defendant from a judgment entered against him upon the report of a referee.

Hills & Dennison, on the 7th of July, 1853, made a contract with defendant, to make for defendant 20,000 forks, one-half two-tined, and the other half three-tined forks, *to be made in a good workmanlike manner.* Defendant to furnish the material and pay for such labor \$1,500. At the same time the written contract was made, H. & D. had on hand about 1,500 forks, and the parties agreed then that the 1,500 should apply on the contract and defendant pay for the steel. H. & D. delivered 16,000 of said forks, and defendant furnished the steel. The parties finally agreed that H. & D. need not construct the balance of said forks, and defendant need not furnish the steel for the balance. The defendant, from time to time, paid \$1,128.71 upon said contract. Dennison sold out his interest to the plaintiff Hills, before suit.

The referee found the following facts from the evidence:

"I. That on the 7th day of July, 1853, the plaintiff and one Welcome Dennison made and entered into, with the defendant, the within agreement, a copy of which is set forth in the complaint in this action; that, under and in pursuance of said agreement, the said plaintiff and Welcome Dennison made and constructed 16,000 forks, and found the ferules for the same; that said forks were from time to time, prior to the first day of May, 1854, delivered to defendant, and that this defendant furnished the steel for said forks, in accordance with said contract, except as hereinafter stated.

II. That, in the fore-part of the month of April, the parties to said written agreement mutually agreed and concluded that said plaintiff and Welcome Dennison, on their part, need not make and construct the balance of said forks or grind the ferules therefor, specified by said written agreement, and that the defendant need not furnish the steel for said balance.

III. That the defendant from time to time, and prior to the commencement of this action, paid to plaintiff and said Wel-

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come Dennison, upon said contract, the sum of \$1,128.71, and that said payments were made generally upon said contract.

IV. That on the 7th day of July, 1858, at the time the within contract was made, the plaintiff and said Dennison had on hand, already constructed, about 1,500 forks, and it was then agreed by said plaintiff and Dennison, with defendant, that said defendant should receive said 1,500 forks, and apply them upon said contract, and it was then and there agreed by said defendant to pay said plaintiff and Dennison the sum of \$176.14, for the steel from which the said 1,500 forks were made; and that said 1,500 forks were delivered by said plaintiff and Dennison to and received by defendant; that said agreement to pay for said steel was separate from, and independent of, the written contract to construct said forks.

V. That Welcome Dennison, for a valuable consideration, and prior to the commencement of this action, to wit: at the date of said assignment to plaintiff, sold, assigned and transferred unto the plaintiff all his right of action arising under and out of said contract, in favor of said plaintiff and Welcome Dennison, and against defendant, and also that said Dennison, for a valuable consideration, and before the commencement of the suit, sold and assigned unto plaintiff all his right, title and interest in the claim of \$176.14 for said steel furnished by plaintiff and Dennison.

VI. That the forks constructed by plaintiff and Dennison, under said contract, and also those delivered, which were already made when said contract was entered into, were not made in a workmanlike manner, but were wrongly and defectively made and constructed, and that said forks were not made according to said contract, but were made in an unworkmanlike and defective manner, and that the damage to defendant, arising from such wrong and defective construction, was \$300.

VII. That the defendant, prior to the commencement of this action, and before all the forks that were made and delivered were delivered, sold his interest in the contract, to Noyes Stillman & Co.

From said facts, the said referee found conclusions of law—

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1st. That the plaintiff is entitled to recover of the defendant the sum of one hundred and seventy-six dollars and fourteen cents, for the steel furnished by the plaintiff and Welcome Dennison, in manufacturing the first 1,500 forks, \$176.14; that the plaintiff is entitled to interest upon said sum from first day of May, 1854, to the date of this report, four years one month and fifteen days, \$50.00.

2d. That the plaintiff is entitled to recover of defendant a balance for manufacturing sixteen thousand forks, and grinding the ferules for the same, at the rate of $7\frac{1}{2}$ cents each, after deducting the sum of eleven hundred and twenty-eight dollars and seventy-one cents, paid by the defendant, which balance is seventy-one dollars and ninety-nine cents."

The defendant excepts to that part of the referee's report which finds that the plaintiff and Welcome Dennison made and constructed 16,000 forks, and found the ferules for the same.

2d. The defendant excepts to that part of the report which finds that the defendant only paid \$1,128.71, to plaintiff and said Dennison.

3d. The defendant excepts to each and every part of the 4th clause of said report, and particularly to that part of said clause which finds that said agreement to pay for said steel was separate from and independent of the written contract to construct said forks.

4th. The defendant also excepts to the 5th clause of said report and every part of the same.

5th. The defendant excepts to that part of said report which finds that the defendant, prior to the commencement of this action, and before all the forks were made and delivered, sold his interest in the said contract to Noyes Stillman & Co.

6th. The defendant excepts to that part of the report which finds that the plaintiff is entitled to recover of the defendant the sum of one hundred and seventy-six dollars and fourteen cents, for the steel furnished by plaintiff and said Dennison, in manufacturing the first 1,500 forks, of \$176.14. Also, to that

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part which finds that plaintiff is entitled to recover interest upon said sum from May 1, 1854, to the date of said report, four years one month and fifteen days, \$50.00.

7th. The defendant further excepts to that part of the report which finds that the plaintiff is entitled to recover of defendant a balance for manufacturing 16,000 forks, and grinding the ferules for the same at the rate of $7\frac{1}{2}$ cents each, after deducting the sum of \$1,128.71, which balance is \$71.99.

8th. And the defendant excepts to that part of said report which directs judgment to be entered for plaintiff against defendant for \$297.46, with costs of this action.

9th. The defendant insists that the referee having found that the forks were not made according to contract and that defendant's damage was more than the plaintiff claim, that upon said facts judgment should have been given for defendant, and defendant excepts to the referee's decision that the defendant cannot be allowed his damage, because he had sold out to Noyes Stillman & Co.

A. N. SHELDON, *for plaintiff.*

GOODWIN & MITCHELL, *for defendant.*

By the court—BALCOM, Justice. The forks were to be made in a good workmanlike manner, and the referee had found they were not so made. The contract, therefore, was not so performed by the plaintiff and his partner as to enable the plaintiff, as entire owner of the demand for the forks, to recover the contract price therefor, as he might have done, if the contract had been fully performed by the plaintiff and his partner. (*Clark agt. Fairchild*, 22 Wend. 576; *Farron agt. Sherwood*, 17 N. Y. Rep. 227.)

Assuming that the acceptance of the forks by the defendant did not estop him from showing they were not made in a good workmanlike manner, he was only liable to pay their value as they were made, not the contract price for them as they should have been made. And, upon a general finding for the plaintiff, that the contract price was due him for the forks, I

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cannot see why the record would not estop the defendant, and also his assignee of the contract, from afterwards recovering damages of the plaintiff and his partner, on the ground that the forks were not made in a workmanlike manner. (*Lawrence agt. Hunt*, 10 *Wend.* 80; *Miller agt. Maurice*, 6 *Hill*, 114; *Davis agt. Talcot*, 2 *Kernan*, 184; *Rogers agt. Haines*, 3 *Greenl.* 363.) The case is much stronger for the defendant than it would be if the plaintiff and his partner had sold the forks to the defendant for a certain price, with a warranty that they were made of a particular kind of steel, and the defence was, that they were not made of that kind of steel, but of another and less valuable kind; for, in such case, the plaintiff would not have been obliged to prove, in the first place, that there was no breach of the warranty, to enable him to recover the contract price. Whereas, in the case as it is, he was obliged to establish that the forks were made in a good workmanlike manner, to entitle him to the contract price; for he could not legally show what that price was without proving the contract and putting it in evidence; and when he did that, he was bound to show he and his partner had performed the contract, to make out his cause of action for such price. It seems to me, therefore, that the defendant did not, by selling the contract for the forks to Noyes Stillman & Co., part with his right to show, when sued for the price of the forks, that they were not such as the contract bound the plaintiff and his partner to make for him.

My conclusion on this branch of the case is, that the plaintiff was only entitled to recover the value of the forks as they were made. For, as the case is situated, I think we ought not to pass upon the question raised by the plaintiff's counsel, that the acceptance of the forks by the defendant estops him from claiming they were not made in a good workmanlike manner. (*See 20 Wend.* 61.)

The promise of the defendant to pay for the steel in question was part of his agreement to receive the first fifteen hundred forks upon the contract, that were manufactured when the same was made, and was so connected with it that the

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advances that were made by the defendant generally upon the contract should be deemed to have been made in payment for the steel, until it was paid for, as the price he agreed to pay for the steel was then due the plaintiff and his partner, and that for the forks did not, by the terms of the contract, become due until all the forks were made. It therefore follows that the referee should have held that the steel was paid for, because such advances exceeded the price of it.

For the foregoing reasons, the judgment in the action should be reversed, and a new trial granted, costs to abide the event. Decision accordingly.

SUPREME COURT.

UDOLPHO WOLFE agt. EMILE GOULARD.

When a person forms a *new word* to designate an article made by him, which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article; but such an exclusive use can never be successfully claimed of words in common use previously, as applied to similar articles.

Words as used in *any language* cannot be appropriated by any one to his exclusive use to designate an article sold by him, similar to that for which they were previously used. That is, no person can acquire a right to the exclusive use of words, applied as the name of an article sold by him, if in their ordinary acceptance they designate the same or a similar article.

Held, that if the plaintiff, in this case, can eventually sustain his legal right, by action, to the use of the name of "Schiedam Schnappa," as applicable to a certain kind of gin alleged to be manufactured and sold by him, he may then obtain the relief by *injunction* he asks for; until then he is not entitled to it, as his right is expressly denied by the defendant.

New-York Special Term, October, 1859.

MOTION by defendant to dissolve injunction.

GILBERT DEAN, *for defendant.*

CHARLES O'CONOR, F. B. CUTTING, and H. E. DAVIES, JR.,
for plaintiff.

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INGRAHAM, Justice. The plaintiff, in his complaint, avers that he has for a long time past been, and now is, the manufacturer and seller of a certain kind of gin, known as "Schiedam Schnapps," of the composition of which he is the original inventor, different from any other kind of gin, and superior to any other; that he first invented and adopted the term "Schiedam Schnapps," as a label, trade-mark or sign of the gin so sold by him, which previously was wholly unused, and never before known in the market as any designation for gin of any kind; that he has used the term "Schiedam Schnapps," as designating the article he sold, from 1848 to the present time, and claims the exclusive right to such name.

He also avers that he used a peculiar shaped bottle, and prepared a label, for which he obtained a copyright.

He charges the defendant with having imitated the bottle used by the plaintiff, with having adopted the term Schiedam Schnapps, and with using wrappers of the same color and resembling the plaintiff's. He charges the defendant with selling a spurious and inferior imitation of the article he sells, under the same name, except substituting the name of Voldner for Wolfe, but calling the article so sold by the same name, "Schiedam Schnapps," and he prays for a perpetual injunction.

An injunction was granted, restraining the defendant from selling any imitation of the plaintiff's gin, or any other article under the name of Schiedam Schnapps, and from the use of any imitations of plaintiff's labels, &c. The defendant now moves to dissolve this injunction.

In his answer, he denies the allegations in the plaintiff's complaint, but admits that for ten years past he has been selling common Holland gin, under the designation of Schiedam Schnapps, and has used square bottles, with a label such as were previously used by Burnett and Oldner, and which were sold by them as Voldner's Schiedam Schnapps. He avers that the article sold by Burnett and Oldner, and subsequently by himself, was a better article than Wolfe's, and denies that it was ever desired to have this article taken for, or confounded with that sold by Wolfe.

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He also claims, that the gin he sells is manufactured in Schiedam; that the term schnapps is used there to represent an alcoholic drink, and was so used there, long before it was adopted by the plaintiff, and was so used in Schiedam long before the plaintiff was born.

Upon the argument of this motion, several affidavits have been produced on both sides, to sustain the views of the respective parties. Among them are a large number of affidavits on the part of the defendant, showing that the term Schiedam Schnapps had been in use at Schiedam, as applicable to liquors, long anterior to 1848; and a large number on the part of the plaintiff, showing that the term had never been applied to liquors sold in this market, or used as a designation of any kind of gin or liquor, until they were so used by plaintiff.

From the course of the argument before me, and the statements of the counsel, it was apparent that the main object of the action and of the injunction was to restrain the defendant from selling any article under the name of Schiedam Schnapps. The shape of the bottles was only used for the purpose of showing the intended imitation. It cannot be, that any person may not use square glass bottles, or colored wrappers, for the sale of an article of trade, whether previously used by another or not.

The labels offered in evidence cannot in any sense be said to be an imitation, either in color, name or contents, and as the plaintiff has a copyright of his label, if it should be used by others, he has an ample remedy in another proceeding.

The question then on this motion is limited to the sole inquiry whether the plaintiff has such a right to the use of the term "Schiedam Schnapps," to designate the liquor which he sells, as to entitle him to an injunction restraining the defendants from using it. It was admitted on the argument that the word "Schiedam," being the name of a town in Holland, could not be so appropriated by the plaintiff, and that the word "Schnapps" was a word adopted from the German language, meaning a dram. Both parties admit its use in Holland, with that signification.

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The defendant also claims and produces some evidence to show that in Schiedam it is used to designate gin.

When a person forms a new word to designate an article made by him which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article, but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles. If the affidavits on the part of the defendant are correct, which state that the word Schnapps is used in Schiedam to designate gin, then the use of the words could not be restrained either there or here, any more than the use of the words New-York gin could be claimed by any one exclusively for gin manufactured in New-York. Words, as used in any language, cannot be appropriated by any one to his exclusive use to designate an article sold by him similar to that for which they were previously used. In *Burgess* agt. *Burgess* (17 *Eng. Law and Equity Reports*, 257), it was held that a person had a right to make and sell any article called "Essence of Anchovy," although the plaintiff and his father had for a long term of years been making and selling such an article under that name, originally invented by them; and that, too, when the sauce was sold in bottles of the same shape as the plaintiff used, with labels, wrappers and catalogues, bearing a general resemblance to those used by him. In the *Amoskeag Manufacturing Company* agt. *Speer* (2 *Sandf. S. C. Rep.* p. 599), DUER, Justice, says: "It is certain that the use by another manufacturer of the words or signs indicative only of these circumstances, *i. e.*, indicating the origin of the article, its appropriate name, the mode or process of its manufacture, &c., may yet have the effect of misleading the public as to the true origin of the goods, but it would be unreasonable to suppose that he is, therefore, precluded from using them as an expression of the facts which they really signify, and which may be just as true in relation to his goods as to those of another."

In *Stokes* agt. *Landgraff and others* (17 *Barb. S. C. Rep.* p. 608), this point was fully discussed by STRONG, Justice. After

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showing the cases in which he may by priority of appropriation obtain a right to the use of many letters, marks or symbols of any kind as a trade-mark, he adds :

"In respect to words, marks or devices, which do not denote the goods or property, or particular place of business of a person, but only the nature, kind or quality of the articles in which he deals, a different rule prevails. No property in such words, marks or devices can be acquired."

Mr. Justice DUER, in *Fettridge agt. Wells* (13 *How. Pr. Rep.* 355), says: "A name may rightfully be used as a trade-mark, but this is only true when the name is used merely as indicating the true origin or ownership of the article offered for sale, never where it is used to designate the article itself, and has become, by adoption and use, its proper appellation.

"The name, no matter when or by whom imposed, becomes by use its proper appellation. Hence, all who have an equal right to manufacture and sell the article have an equal right to designate and sell it by its appropriate name, &c., provided each person is careful to sell the article as prepared and manufactured by himself, and not by another."

The exclusive right, to use as a trade-mark the appropriate name of a manufactured article, exists only in those who have an exclusive right to the article itself. So it was held by Lord MANSFIELD in *Leighton agt. Bolton* (3 *Dow*, 293), that although the plaintiff had been selling a particular medicine, under the name of "Dr. Johnson's Yellow Ointment," yet the defendant had an equal right to prepare and sell it under the same name, there being no evidence to show that he sold it as prepared by the plaintiff.

In *Perry agt. Truffit* (6 *Beav.* 66), the plaintiff claimed to be the inventor of Perry's Medicated Mexican Balm, and applied for an injunction to restrain the defendant from selling a similar medicine, which he called Truffit's Medicated Mexican Balm, but the injunction was not granted.

In *Clark agt. Clark* (25 *Barb.* 75), Mr. Justice MITCHELL held, in the general term of this district, that a manufacturer might use the same word as another to designate his manufac-

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ture, but must not use it so as to imitate an article previously sold by another.

In *Brooklyn White Lead Company* agt. *Maury* (25 Barb. 416), the court held that although the plaintiffs had sold their lead under the name of Brooklyn White Lead, for a long time, yet that the defendant might assume the same name to describe a similar article sold by him, and only restrained him from adding the word "Co." thereunto, as used by the plaintiffs; and in *Merrimack Manufacturing Co.* agt. *Garner* (4 E. D. Smith's R. 387), it was said, the defendants have a right to imitate and sell the same style of goods as those manufactured by the plaintiffs, and the plaintiffs have no ground of complaint, unless the label used upon the article in imitation would lead persons to suppose that they were buying goods actually manufactured by the plaintiffs.

From these cases and various others which might be cited, it is apparent that no person can acquire a right to the exclusive use of words, applied as the name of an article sold by them, if in their ordinary acceptation they designate the same or a similar article.

Upon the true meaning of this word in Holland there is contradictory testimony. I do not deem it necessary upon this motion to decide it. Enough is shown at least to make it very doubtful whether the plaintiff can have any right to the exclusive use of this name. His right to it is expressly denied by the defendant, and when that is the case, an injunction is never granted in the first instance until the plaintiff has established his legal right to it by an action. (2 Barb. Ch. R. 101; *Motley* agt. *Downman*, 3 *Mylne & Craig*, 14.) If the plaintiff in this action establishes his right to this name exclusively he may then obtain the relief he asks for; until then he is not entitled to the injunction.

I think, also, there is difficulty in sustaining this injunction for another reason. There is no pretence that the defendant ever sold his manufacture as that of Wolfe. On the contrary, he placed upon his bottles and labels, in large and plain characters, the name of Voldner as the manufacturer.

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I am at a loss to see how he can be charged with selling it as an imitation of the plaintiff's article. The plaintiff's name is not used. The defendant sells under the name of a different person (whether real or fictitious is immaterial), so plainly that no one, who does not wish to be deceived, could for a moment suppose he was buying an article manufactured by Mr. Wolfe, as was said by BRUCE, F. J., in *Burgess agt. Burgess*. The ground of complaint is the great celebrity which the plaintiff's manufacture had obtained, and which might be affected. This does not give him an exclusive right, monopoly or privilege, so as to prevent any man from making the same article and selling it under his own name.

I deem it, however, unnecessary to discuss these questions any further, for the reason that, even if the plaintiff can eventually sustain his right to the use of this name, he is not entitled to the injunction under affidavits denying his right thereto, until he has obtained a judgment establishing such right to be beyond dispute.

The motion to dissolve the injunction is granted with \$10 costs.

SUPREME COURT.

THE PEOPLE *ex rel.* HARRISON A. LYON and others agt. SAMUEL PIKE and others, Commissioners of Highways, &c.

The power of commissioners of highways to *discontinue* roads is limited to roads which have, since they were laid out, become, or proved upon trial to be, useless and unnecessary. It does not extend so far as to allow them, or a jury of freeholders called by them, to review and reverse decisions of the commissioners laying out the road, especially where the decisions have been affirmed on appeal.

The proceedings of commissioners of highways for the discontinuance of a road are void where it does not appear that any ground is stated in the application for the discontinuance, and, also, where it appears that the proceedings were taken within four years from the time of the filing of the decision upon appeal, laying out the road.

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Monroe Special Term, Dec., 1859.

MOTION for a peremptory mandamus.

T. R. STRONG, Justice. The power of commissioners of highways to discontinue roads does not extend so far as to allow them, or a jury of freeholders called by them, to review and reverse decisions of the commissioners laying out the road, especially where the decisions have been affirmed upon appeal. It is limited to roads which have, since they were laid out, become, or proved upon trial to be, useless and unnecessary. No ground for the application for the discontinuance of the road in question is stated in the return to the alternative mandamus, nor does it appear by the return whether the jury of freeholders found that the road was useless and unnecessary, because there never was any occasion for it, or because the occasion for it had ceased, or it had been proved by experience to be of no public benefit or convenience. I am of opinion, therefore, that the proceedings for the discontinuance of the road, as stated in the return, are a nullity.

I am inclined to think, also, that the proceedings for the discontinuance of the road are void for the further reason, that they could not be taken within four years from the time of the filing of the decision upon the appeal. By section 9 of chapter 455 of the Laws of 1847, when the referees "shall make any decision laying out, altering or discontinuing any road in whole or in part," it shall be the duty of the commissioners to carry out the decision, &c., "and such decision shall remain unaltered for the term of four years from the time the same shall have been filed in the office of the town clerk." The affirmance of the decision of the commissioners is making a decision laying out the road, within the meaning of that provision. The policy of the provision is to prevent litigation for the period specified in regard to the road, after the decision on appeal; and it is applicable to a case of affirmance of a decision of the commissioners laying out, as to a case where they have refused, and the referees have laid out the road. By a similar provision in the Revised Statutes, when the appeal was

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to the judges, "no road which has been fixed by the decision of the judges, on appeal to them, shall be discontinued or altered," for the time therein mentioned, &c. This relates to cases of affirmance, as well as reversal and laying out. The existing analogous provision means the same thing, although different phraseology is employed.

It was the duty of the commissioners to carry out the determination on appeal, the same as if their decision had been in favor of the road, and there had been no appeal; that is to give the owners or occupants of the land through which the road is laid sixty days' notice in writing, to remove their fences, and, upon the default of such owners or occupants, to cause the fences to be removed; and to direct the road to be opened and worked.

The expensiveness of the road does not affect, and is no excuse for not discharging the duty of the commissioners; and the want of funds is no reason why the commissioners should not proceed as far as they can without them.

A peremptory mandamus is, therefore, allowed, requiring the commissioners to take the steps prescribed by the statute for the removal of the fences and the opening and working of the road; but they are not to be required to work the road further than as they have funds, or than funds shall be provided enabling them to do so.

SUPREME COURT.

THE PEOPLE agt. FELIX SANCHEZ.

An averment in an indictment, describing a mortal wound made by a sword "in and upon the body," is not defective, because it does not specify the part of the body in which the wound was inflicted; nor is it defective in stating only one wound instead of two.

Such objections are matters of form which, under the statute, may be disregarded as not tending to the prejudice of the defendant. Besides, they are objections which may be taken before, but not *after verdict*—the law on this point being the same in criminal as in civil cases.

Where a juror, on challenge, stated that "he had read part of the statements in

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the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence, but had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but he would be governed entirely by the evidence produced on the stand;" *held*, that the juror was impartial within the meaning of the law requiring jurors to be persons "of sound judgment and well informed," and was properly allowed to be sworn.

The *heat of passion*, where there is a design to effect death by a dangerous weapon, is no excuse in law or palliation of the act, although not premeditated and not directed against any particular individual, but evinces a depraved mind and a reckless disregard of human life.

New-York General Term, October, 1859.

Present, ROOSEVELT, CLERKE and SUTHERLAND, Justices.

MOTION for a new trial.

MR. ANTHON, *for motion.*

PETER B. SWEENEY, *District-Attorney, opposed.*

By the court—ROOSEVELT, Ch. Justice. The prisoner, Sanchez, was convicted at a court of sessions of the crime of murder, in taking the life of one Curnon, his wife's father, on the 6th of January last, at No. 154 Sullivan street, in the city of New-York, by stabbing him with a sword-cane through the lungs, in a manner which, according to the testimony, must have produced instantaneous death.

Before the execution of the sentence, a writ of error was sued out by the prisoner to bring the proceedings into the supreme court for review, in pursuance of the recent statute in relation to capital convictions in the court of sessions of this city, which gives to parties in such cases a right to a new trial if the supreme court shall be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below. (*Laws of 1855, p. 613.*)

Several exceptions, however, were specifically taken at the trial, and still insisted on as grounds for reversal.

It was contended, among other objections, that the indictment was defective in not specifying the part of the body in which the wound was inflicted, and in stating only one wound to have been given instead of two.

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The object of an indictment is to give to the prisoner reasonable notice of the crime with which he is charged, so that he may be enabled to prepare his defence, and also to protect him, if necessary, from a second trial for the same offence, by showing from the record the identity of the two accusations.

This indictment describes the stab as made by a sword "in and upon the body" of Curnon, inflicting upon his body "one mortal wound of the breadth of one inch and of the depth of three inches," of which he "instantly died." The term body, in such a connection, clearly means only that part of the human frame to which the head and limbs are attached. Of what consequence is it whether the wound was given to the left side or to the right side, below the fifth rib or above the fifth rib, or whether there were two wounds or one, if both or either were mortal? That these minute particulars are not matters of substance is evident from the well established rule that, if averred one way in the indictment, they may be proved another way on the trial. To test the objection, let us suppose that the wound, instead of three inches in depth, had turned out to be two inches and three-quarters, would the legal consequences have been an acquittal? Even the musty records of antiquity furnish no authority for such a proposition. If they did, we should not feel ourselves compelled to follow it. The common law is a progressive science, and one of its leading attributes is adaptation to the circumstances and spirit of the age and to the common sense of the people, of whose actions it is made the rule, and of whose will it is the presumed exponent. The statute, too, admonishes us to disregard the mere cobwebs of former days. "No indictment shall be deemed invalid, &c., by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant."

That the defendant did not consider himself prejudiced, or likely to be prejudiced, by the alleged uncertainty of this indictment, is shown by the fact that, instead of demurring, he went to trial upon it, and had no consciousness of the supposed error until after a verdict of guilty had been pronounced,

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and he was instructed by his counsel to move an arrest of judgment.

There are many objections which may be taken before, that cannot be taken after verdict. And the law on that point is the same in criminal as in civil cases.

The next suggestion relates to one of the jurors, who, being challenged, said that "he had read part of the statements in the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence, but had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but he would be governed entirely by the evidence produced on the stand."

The court below admitted the juror to be qualified, and it is quite obvious that if jurors are on such grounds to be rejected, it will be impossible at the present day to administer justice in cases sufficiently exciting to inspire a newspaper paragraph. Every male adult over twenty-one and under sixty, "in possession of his natural faculties, and not infirm or decrepit, of sound judgment and well informed" (and no other can be a juror), must read the news of the day, and must, from such reading, form some "idea or impression." If an idea or impression, therefore, is to be a disqualification, no competent juror at the present time can be found; for no man, in a land of newspapers, can be "well informed" without reading, or, with a "sound judgment," can read without receiving an "idea or impression."

The case of Cancemi, when last under review in the court of appeals, involved two propositions, one relating to the alleged improper allowance of a juror, and the other to the erroneous charge. All the judges agreed that there was an error in the charge, but all did not agree, nor was it necessary to the result that they should, that the juror was improperly admitted. In other words, all agreed in the propriety of a new trial, some on one ground, some on the other, and some on both. The decision, therefore, can hardly be considered as a controlling authority on either of the questions referred to—

certainly not to support the proposition for which it is cited in the present case. In its strongest aspect it went no further than to hold that a juror who had both "formed and expressed an opinion," which was so fixed that it would require an affirmative evidence to dislodge it, was not qualified to sit as an impartial umpire between the people and the prisoner. The case of *Cancemi*, therefore, although it illustrates, does not dispose of that of *Sanchez*, and we think the principle contended for will be found so embarrassing in practice that it should rather be restricted than extended.

To understand the other points discussed by the prisoner's counsel, a brief statement of facts is necessary. *Sanchez*, it appears, only a few weeks previous to the homicide, had been married to *Curnon's* daughter, and had taken up his residence in the same house with his father-in-law. The family consisted of Mr. and Mrs. *Curnon*, their two daughters, and *Sanchez*. On the night in question he had possessed himself, for what reason does not appear, of *Curnon's* sword-cane, or rather of the sword drawn from the cane, and with his wife was in the room of his father-in-law, the old people being below in the basement. Mrs. *Curnon* says:

"My husband and I proceeded up stairs to go to bed, and found the door of the parlor, which was the room in which my husband and I slept, locked; I saw *Sanchez* standing by his bedside as I looked in through the small window at the head of the stairs; I said, 'Feelee, open the door,' which I repeated three times; but he made no reply; I then spoke to *Sarah Jane*, who was sitting up in the bed, and said, 'Sarah Jane, open the door;' to which she answered, 'He won't let me;' I put my hand to the door and gave it one shove, and it flew open, which forced me into the room, my husband must have followed me; there was no one there but *Sanchez*, who bounded out of the bedroom as I came in the door; he rushed upon me and stabbed me with a sword which he held in his hand; then *Sarah Jane* jumped out of the bed and passed him, he turned quick and gave her a stab in the shoulder; he then turned upon my husband, I saw my husband's hand

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raised; I saw Sanchez make a plunge at him with the sword-cane, I saw but one blow; in the morning I saw my husband lying dead on the floor," &c.

Here would seem to have been, in the common acceptation of the term, no "premeditated design to effect the death of the person killed," but still the act may be murder. Killing, says the statute, shall be deemed murder "when perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." Whoever recklessly uses a murderous weapon is in law responsible for the consequences. The law does not regard the want of adequate motive as a mitigation or justification, or as evidence of that species of insanity which makes the perpetrator an irresponsible machine. Mere jealousy, like hatred or malice, may explain, but cannot excuse, the wanton disregard of human life. The object of penalties is to compel men to control their depraved minds, and to teach them not to yield to frenzied passion. In this view, what defence could it be to say that some person had told the prisoner—falsely as appears—that his wife had been unfaithful? The rumor communicated to the injured husband might inflame passion, but, in the case of a "dangerous weapon," would have no tendency to show any absence of "design to effect death," so as to reduce the crime from murder to manslaughter. More especially was the inquiry irrelevant when the person killed, instead of being the alleged adulterer, was the father of the wife.

Is a husband, on being told of his wife's supposed infidelity, to seize a dagger, and on the instant commence stabbing every person that comes near him, and then to quote the monstrous atrocity of the act, in connection with such rumor, true or false, as evidence of insane frenzy? We think not, and that the question objected to by the public prosecutor, although it might as well have been allowed, was lawfully overruled, and that no injustice has been done by its exclusion.

The same remark applies to several other questions which were excluded by the court below.

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A point has been raised as to the testimony of the prisoner's wife, who by consent was permitted to be sworn on his behalf, but who, when sworn, stated that her husband did not accuse her of any improper intercourse. This statement being sought to be contradicted by her answers before the coroner, the district-attorney objected to the question, on the ground that a party cannot impeach his own witness. Such, undoubtedly, is the rule of law. There was, therefore, no legal error in the exclusion. And as to any supposed injustice, it was sufficiently obviated by the subsequent admission of all the proceedings had before the coroner, and among them the following statement:

"My husband accused me of having improper intercourse with a man named Annisetto Lajeunechette, and threatened that unless I told the truth he would stab me; he accused me of being a prostitute; I was sitting up in bed crying at the time; my mother knocked at the door on account of his remarks; I heard her burst in the door."

So that if the defendant's own witness had in fact contradicted herself, both the versions given by her were submitted to the jury to be weighed as they might deem proper. Which of the two they believed does not appear; but neither, it is clear, warranted or was deemed to warrant a verdict of acquittal or of manslaughter.

The result is:

First. That the indictment, in the particulars excepted to, was sufficient, or that its defects, if any, were merely formal, and were cured by the statute of amendments and by the verdict.

Second. That the juror objected to, being impartial within the meaning of the law requiring jurors to be persons of "sound judgment and well informed," was properly allowed to be sworn.

Third. That whether information of his wife's alleged infidelity was communicated to the prisoner or not, and whether such information, if communicated, was true or not, was an

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immaterial inquiry, as it in no way tended to justify the homicide or to reduce its grade from murder to manslaughter.

Fourth. That neither the evidence excluded, nor the evidence received, had any tendency to show legal insanity, or to exempt the perpetrator of the homicide from responsibility for his acts.

Fifth. That the heat of passion, where there is a design to effect death by a dangerous weapon, is no excuse in law or palliation of the act, although not premeditated and not directed against any particular individual, but evinces a depraved mind and a reckless disregard of human life.

Sixth. That, as, therefore, there was no legal error in the rulings of the court below, and, tested by the statute "of crimes punishable with death," no injustice in the verdict of the jury, the application for a new trial must be denied and the judgment affirmed.

Justice SUTHERLAND said he agreed with the chief justice in his conclusions upon the merits of the case, but could not give his assent to that part of the opinion which made or appeared to make, a prevailing public sentiment superior to the common law. He could not believe that current public opinion could in any sense be considered safer than the common law, or that it could be dignified as an element of the common law.

SUPREME COURT.

SARAH E. WIGHTMAN agt. ROBERT H. SHANKLAND and
ELEAZER HANNAN.

Where the answer of the defendant is sufficient to bar the action, and it is demurred to, and the demurrer is determined in favor of the answer, the proper judgment to be entered is a final judgment that the plaintiff take nothing by his complaint, and a dismissal thereof, although there may be issues of fact joined in the cause.

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But where the matter stated in the answer is demurred to, and it is determined by the court that it is such matter as the defendant has a right to state as a defence, though not constituting a *bar* to the action, and "judgment for defendant with leave to plaintiff to withdraw the demurrer in twenty days, on payment of costs," is directed; the defendant is irregular in entering a *judgment for costs*, where the terms are not complied with by the plaintiff. The decision should stand as an *order* overruling the demurrer. What remedy the defendant has for his costs is not very clear.

It is now well settled, that matter may, under certain circumstances, be stated in an answer by way of *defence* which will not constitute a *bar*, but such an answer cannot be demurred to, or if demurred to it will be overruled.

Niagara General Term, September, 1859.

Present, GREENE, P. J., MARVIN and DAVIS, Justices.

APPEAL from judgment entered upon demurrer to answer. The action was to recover damages for a libel. The matter complained of as libelous is set forth in the complaint with innuendoes.

The defendants denied the complaint generally; and then, for a second and further answer, alleged that the facts embraced in the supposed libel were substantially true, to wit: (then follow various allegations of facts, which, however, do not entirely meet and cover all the libelous matter as stated in the complaint). The plaintiff demurred to this answer on the ground that it was "insufficient in law to bar the plaintiff's cause of action, or any part thereof."

The issue raised by the demurrer was tried, before Justice GROVER, at the circuit and special term, held in Cattaraugus county, in July, 1858, and the court ordered judgment for defendants, with leave to the plaintiff to withdraw the demurrer, &c., in twenty days, on payment of costs. The defendants entered an order "that the said demurrer be, and the same hereby is overruled, and the defendants have judgment thereon. And it is further ordered, that the plaintiff have leave to withdraw her demurrer in twenty days from the service of a copy of this order, on payment of costs."

The plaintiff's attorney took no action in the case, and the record or papers show another order or judgment, entered in October, with the caption, "judgment signed, October 8th,

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1858." After reciting the previous proceedings in the case, and that twenty days had elapsed, and that the demurrer had not been withdrawn nor the costs paid, it is declared, "now, on motion of Lamb & Bolles, attorneys for the defendants, it is adjudged that the defendants recover of the plaintiff the sum of thirty-seven dollars and sixty-five cents, for their costs and disbursements in this action." This is signed by the clerk.

At a special term held in Erie county, in November, 1858, present Justice MARVIN, the plaintiff's counsel moved that the judgment be set aside for irregularity. It was ordered that the judgment be set aside, that the plaintiff have leave to withdraw her demurrer upon payment of costs, within twenty days, that if she failed to do so, the defendants should be at liberty to have the costs of the action adjusted and to enter final judgment, disposing of the whole case in their favor. The plaintiff not availing herself of the leave to withdraw the demurrer, &c., the defendants entered final judgment, dismissing the complaint, and that the defendants recover their costs and disbursements, \$37.52, and that they have execution therefor.

From this judgment the plaintiff appealed to the general term.

A. G. RICE, *for plaintiff.*

D. H. BOLLES, *for defendants.*

By the court—MARVIN, Justice. It is quite clear that this judgment cannot be sustained, but what should be done with it is not quite so clear. I was led into error by the papers, and the positions of counsel at the Erie November special term, 1858, as to what had actually been decided by brother GROVER, upon the trial of the issue raised by the demurrer. I understood, and so my written opinion distinctly shows, that the court, in deciding the issue raised by the demurrer, decided that the answer stated facts, which constituted a complete bar to the action. And I held, upon this assumption, that the judgment entered by the defendants should have been final, disposing of the entire case. It was then argued by the coun-

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sel for the plaintiff, that, as there was an issue of fact, no judgment could be entered until such issue had been tried. In answer to this position, I remarked, "this depends upon the nature of the issue. If there is an issue of fact, and also an issue of law, and the latter is first tried, and the decision upon it is in favor of the defendant, but the question decided does not *bar* the action, the issue of fact must be tried before the judgment roll is made up, but if the defendants' plea in answer is sufficient to *bar* the action, and is demurred to, and the demurrer is determined in favor of the answer, the judgment, that the plaintiff take nothing by his complaint, is the proper judgment, though there may be issues of fact joined in the cause. The reason of this is quite obvious. If the defendant states, in one answer, facts which constitute a *bar* to the action, and these facts are admitted by the demurrer, there can be no necessity of trying any of the issues of fact, as the defendant must have judgment upon the whole record." (*See Gra. Pr. 760 et seq., and cases there cited.*)

Thus is seen the ground upon which my decision proceeded, I supposed that Justice GROVER had decided that the matter of the answer constituted a *bar*. I was not reviewing his decision. The question before me was a question of practice, whether the defendants' attorney had followed out the decision of the court. We have now published, for the first time, the opinion of Justice GROVER, delivered at the time he decided the issue raised by the demurrer, and it is now entirely clear that he did not understand or decide that the matter stated in the answer constituted a complete defence—*bar* to the action. But he regarded it as matter which the defendants had a right, in the action of libel, to plead or state in an answer. He, therefore, overruled the demurrer, furnishing a brief direction, "judgment for defendants, with leave to plaintiff to withdraw the demurrer, &c., in twenty days, on payment of costs." Upon this direction, the attorneys for the defendants entered the judgment for costs, without dismissing the complaint. They called it a judgment. Its caption is, "judgment signed October 8th, 1858." The language is, "it is *adjudged* that the de-

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fendants recover of the plaintiff the sum of \$37.65, for their costs and disbursements in this action." This judgment or order I set aside, and very properly, as I still think, regarding it as a judgment, and not simply as an order. I know of no practice justifying such a judgment. The Code declares, "a judgment is the *final* determination of the rights of the parties in an action." (Section 245.) By section 400, "every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." By section 349, an appeal is given from an *order*, "when it sustains or overrules a demurrer."

The defendant's attorneys should not have attempted to enter a judgment in this case, unless they understood the court as deciding that the matter pleaded constituted a complete bar, and then the judgment should have been final, dismissing the complaint, so that the plaintiff could have appealed from it as a judgment, and if affirmed on appeal, then could appeal to the court of appeals. Understanding that the court at special term had so decided, I directed the judgment to be put in the form of a final judgment. In this I erred from a misapprehension of what the special term had actually decided. I ought simply to have set the judgment aside, leaving the order entered at the special term, overruling the demurrer, and giving the plaintiff leave to withdraw it on payment of costs, &c., to stand. I will not now stop to inquire what the remedy of the defendants was for their costs.

It is now well settled that matter may, under certain circumstances, be stated in an answer by way of *defence*, which will not constitute a *bar*, and, of course, if that is allowable, such answer cannot be demurred to, or, if a demurrer is interposed, it will be overruled. (See *Houghton agt. Townsend*, 8 *How. Pr. R.* 441; *Bush agt. Prosser*, 1 *Ker.* 852; *Howard's Code*, and cases cited under section 149; and section 164, relating to actions for libel or slander.)

By the Code as amended in 1857 (section 153), the plaintiff may demur to an answer containing new matter, "when upon its face it does not constitute a counter-claim or defence." It

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is added, "and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims." Prior to 1857, the language was, "the plaintiff may, in all cases, demur to the answer for insufficiency, stating in his demurrer the grounds thereof." As I understand the Code (*See Houghton agt. Townsend, supra*), little or no change was effected by this amendment of 1857, as I held that any *new matter*, that was available as a partial defence, might be pleaded, unless it was matter that could be given in evidence under a denial answer, as evidence in mitigation of damages in assault and battery, &c., &c. By the amendment of 1857, however, the language "for insufficiency" is omitted, and now he may demur to the answer when upon its face it does not constitute a counter-claim or *defence*, so that the question is, does the new matter pleaded constitute a counter-claim or *defence*. In other words, is it matter that may be pleaded in an answer? Not, is it matter that will bar the action. If it is matter that may be pleaded by way of defence, any demurrer to it must be overruled. The amendment of 1857, by leaving out the words "for insufficiency," have probably removed any doubt previously existing as to the proper construction to be given to the word *defence*. This word is left to stand with the construction previously given to it.

I notice in this case, though the action was commenced after the amendment of 1857, that the pleader has demurred on the ground that the answer is *insufficient* in law to bar the plaintiff's cause of action or any part thereof. But, as already stated, I did not assume at the special term to review the decision of Justice GROVER. The question before me was one of regularity. The decision of Justice GROVER is not now before us, as he did not, as the case is now understood, decide that the matter stated in the answer barred the action. Such judgment has been entered in pursuance of my directions made at a special term, upon a motion to set the judgment entered aside. All the proceedings, from and including the entry of the judgment founded upon the decision of Justice GROVER,

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have been *irregular* and should be set aside. There has been no decision authorizing such a judgment.

It is not a case for reversing the judgment. There should have been an appeal from the order made by me, or some course should have been taken to put the court, at a special term, in possession of the facts as they really existed. Unless the respective attorneys actually understood that Justice GROVER decided that the answer constituted a *bar* to the action, they must, upon reading my opinion, have discovered that I had fallen into error.

I think the judgment entered upon the decision of Justice GROVER and all subsequent proceedings should be *set aside*, upon the ground of irregularity.

UNITED STATES CIRCUIT COURT.

E. B. CROCKER *et al.* agt. HEMAN J. REDFIELD.

Coin shipped from China, described in the invoices as "copper cash," which passes in China by count as money, and the only coin there, cannot be imported into this country free of duty, or brought within the free-list, without at first proving that it was imported to be used as part of the currency of the country, or that it is, or was at the time of the importation, a part of such currency.

A *protest* made against the payment of the duty and penalty on an article of importation, *after* the money is paid and in the hands of the collector, and the duty is ascertained comes too late.

It seems, that a suit cannot be sustained for a balance of money paid for duties in the hands of the collector, where the amount was *tendered* to the plaintiffs before suit brought.

New - York, October, 1859.

MOTION for judgment.

MR. GRISWOLD, *for plaintiffs.*

MR. HUNT, *for defendant.*

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NELSON, C. J. The suit is brought in this case to recover an excess of duty paid under protest, (1) on a shipment of Chinese coin, and (2) on a shipment of Jute in 1854, 1855. (1.) The coin shipped was one thousand boxes which is described in the invoices "copper cash." It appears from the evidence in the case, that this description of coin, at the time of the importation from China, passed in that country by count as money, and was known by the designation of "copper cash," the only coin in China. That the pieces were composed of 60 per cent. to 70 per cent. copper; and 30 per cent. to 40 per cent. of lead or nickel.

The plaintiffs claim that the article is entitled to be imported into the country free of duty under schedule I of the Tariff Act of 1846, within the words "coins, gold, silver and copper." The collector claims that it falls under the description in schedule H, "copper when old and fit only to be newly manufactured," and chargeable with a duty of five per cent.

The purpose for which the coin was imported is nowhere stated in the case. Some light, we think, might have been thrown upon the question if evidence had been given on this point; for we are inclined to think that the clause in the free-list had reference to coins that were imported into the country for circulation as money, and inasmuch as no such purpose appears in respect to the coin in question, and no inference can be drawn to this effect from the description or designation of the article, the better opinion is that it has been properly arranged under schedule H, within the terms above referred to.

At least in our view of the clause of the free-list, we are of opinion that the article in question cannot be brought within it, without at first proving that it was imported to be used as part of the currency of the country, or that it is or was at the time of the importation a part of such currency.

II. As it respects the excess of duty claimed to be recovered upon the shipment of Jute, it is a sufficient answer to say that the protest is defective. It appears on the face of it that the money was paid, and in the hands of the collector before it was made against the payment of the duty and penalty.

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There is no date to it, but the inference is unavoidable from the facts stated. Indeed, a balance is still in the hands of the collector of \$92.85. It is said that the money was only deposited with the collector as a security for the payment of the duties when ascertained, and that the application did not take place till the ascertainment of the duties. Admitting this to be so, we do not agree to the consequence claimed. The money deposited was to be applied by the collector to the duties, and it cannot be said after this that it was paid compulsorily in order to get possession of the goods. The protest after the duties were ascertained came too late.

3. We do not think that the suit should be sustained for the \$92.85, as this was tendered to the plaintiffs before suit brought. The plaintiffs knew that sum was ready for them at any time since the ascertainment of the duties. Judgment for the defendant.

UNITED STATES CIRCUIT COURT.

ENOCH RIESS *et al.* agt. HEMAN J. REDFIELD.

Where it appeared that the usual rate of commission at China, upon goods imported from there, was two per cent., *held*, that an additional charge of one-half per cent. therefor, at the custom-house, was error.

The *market value* of goods at the port of exportation is the criterion to govern the officers at the customs; and any discounts that may be made to the parties purchasing are not to be taken into the account.

Appraisers cannot add to the invoice value of goods, as a charge for *export duty* at the port of shipment, upon the ground that the invoice value is too low. If they regard the invoice value as too low, they must raise it by appraisal in the ordinary way.

New - York, October, 1859.

MOTION for judgment.

MR. GRISWOLD, *for plaintiffs.*

MR. HUNT, *for defendant.*

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NELSON, C. J. This action is brought by the importers to recover an excess of duties paid under protest. The goods were imported from China. No question has been made upon the invoice value at the port of shipment; the objections are confined to the additional charges made at the custom-house, thereby increasing the dutiable value.

The first is, that half per cent. was added to the charge for commission at China, making them two and a half per cent. when the usual rate is only two per cent.

The proof in the case is full that two per cent. only was charged, and that it is the usual rate of commission. It was error, therefore, in adding the half per cent.

II. It is objected that the collector erred in striking from the invoice two per cent. discount from the invoice value, which discount is made to the purchaser of the goods, as this abatement in the price is generally made according to the usage of the trade in China. The answer to this objection is, that the market value at the port of exportation is the criterion to govern the officers at the customs; and any discounts that may be made to the parties purchasing are not to be taken into account.

These discounts may, and often do, depend upon the particular terms of the purchase.

There are cases which have been heretofore before the court, in which it appeared that the trade in the foreign country had agreed upon a rate of prices for certain classes of goods, and, as the price subsequently fluctuated, made a discount, if the price fell below, or an addition if it rose above the standard, as a mode of fixing the market value at the time. The court held, that an arbitrary rejection of the discount under the circumstances stated at the customs in ascertaining the dutiable value was erroneous. But the present case is altogether a different one, and not governed by the principle of that class of cases.

III. An addition was made by the appraisers to the invoice value as a charge for export duty at the port of shipment, which, as is shown in the case, had no existence.

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This duty when not found in the invoice is paid by the seller of the goods to the government, and enters into the invoice value of the article. One of the appraisers, who is a witness in the case, admits that the invoice value was not raised by an appraisement; and that the addition of the export charges was made upon the idea that the invoice value of the goods was too low. This was an error. If the appraisers regarded the invoice value as too low, they could have raised it by appraisal in the ordinary way, which would have afforded the importer the right of appeal to the merchant appraisers, instead of adding an arbitrary and, as it appears, a fictitious charge for exportation.

The plaintiffs are entitled to a judgment for the excess arising from the claim of two and a-half instead of two per cent. commission, and also out of the charges for export duty. The amount to be settled by the clerk if the counsel do not agree upon it.

S. F. Goodridge et als. agt. Heman J. Redfield; F. A. Chase et als. agt. The Same. It is stipulated these cases shall abide the result in the above case. Judgment for the plaintiffs on the same principles.

SUPREME COURT.

VALENTINE FRELIGH agt. JAMES D. BRINK and NOAH SNIDER.

The statement upon which judgment in this case was confessed is as follows: "The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated June 21st, 1854, in the sum of seven hundred dollars, with interest; that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and seven cents; together with eighty dollars and forty-one cents, now due the plaintiff from the defendants as costs, in an action brought against the de

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defendants by the plaintiff on said promissory note, in the supreme court, which suit is now discontinued by the plaintiff, upon this confession of judgment to him by the defendants,"—*held*, sufficient, under the statute. (*This decision reverses that at special term, 16 How. 272.*)

Albany General Term, September, 1858.

Present, WRIGHT, GOULD and HOGEBROOM, Justices.

APPEAL from decision at special term, setting aside the judgment by confession in this case.

Jeremiah Russell, a judgment-creditor of the defendants, Brink and Snider, moves to set aside the judgment entered by confession in this action for the insufficiency of the statement, which is in the following words: "The above indebtedness arose on a promissory note, made by the defendants to the plaintiff, dated June 21st, 1854, in the sum of seven hundred dollars with interest; that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and seven cents; together with eighty dollars and forty-one cents, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff upon said promissory note, in the supreme court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants." Mr. Justice BROWN, at special term, held that the statement was wholly inadequate to sustain the judgment, and set aside the judgment with costs. (*Reported 16 How. 272.*) From this decision an appeal was taken to the general term of the third district.

E. WHITAKER, *for defendants.*

SCHOONMAKER & WESTBROOK, *for judgment-creditor.*

GOULD, Justice. Having had occasion to pass upon quite a number of motions similar to this one, I am forced to the conclusion, that treating the decisions as going the length of the order in this case, and of those in some other reported cases in this court, makes the law commit greater *actual frauds* than

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those that the provisions of the Code as to judgments by confession intended to prevent. I have never heard such a motion, where it was not perfectly apparent, and, indeed, generally, it has been conceded by the moving party, that the judgment to be avoided by the motion was perfectly fair and honest; and its avoidance would deprive a *bona fide* creditor of his whole debt.

The motion in the case before us is no exception to this remark. There is no pretence whatever that the first judgment is not, to the last fraction, for a debt honestly due, and setting it aside would be a very serious injury to the plaintiff. To be sure, if the law really means that, to make a good confession of judgment, there must be a *bill of items, with the ciphering of interest* entered on the records of the court, it must be done. I hope, however, that it will not be so held. And I should be glad to sustain this judgment. To do so, I should hold the words, "that amount of money *being had* by the defendants of the plaintiff," to mean "being *then* had;" and so fairly equivalent to a statement that the note was for money lent upon it. And this, I take it, would be good without saying whether the loan consisted of gold or silver, or bank notes, or was paid by a check on bank. The case of *Chappell agt. Chappell* (2 Kern. 215) is certainly *not* an authority against such a holding. I should reverse the order appealed from.

WRIGHT, J. I think the statement sufficient under the statute. It is substantially stated that the indebtedness was for money borrowed by the defendants of the plaintiff. It is true that it is not stated when it was borrowed, nor is that particularly required. To sustain the judgment (rather than it should be avoided by construction), we should construe the phrase "money being had," as "money being had by the defendants," at the date of the promissory note before recited. In my judgment, there has been too much of a disposition in the courts to fritter away this beneficial statute by refined construction.

Decision of special term reversed.

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HOGEBROOM, J., *dissented*. I have looked over this opinion (of Judge BROWN at special term), and the briefs of counsel with some care, and am inclined to think the question is settled *upon authority* in favor of the conclusion at which Judge BROWN arrives, and, therefore, whatever might be our opinion of the case as an original question, the order of the special term should be *affirmed*.

SUPREME COURT.

THE PEOPLE agt. RICHARDSON.

Additional proof may be offered and received to the return on the hearing of a *habeas corpus* of the facts stated in the affidavit alleging the crime upon which the defendant was committed before the magistrate. (*But it seems not after indictment.* See *People agt. McLeod*, 25 Wend. 483.)

New-York Special Term, November, 1859.

HEARING on return to habeas corpus.

INGRAHAM, Justice. The affidavits made before the police justice show that the prisoner proposed to Little to retain the money of his employer, which he was sent to obtain from the bank. Knowing the money to be the property of Winslow, Lanier & Co., he took the money from Little and concealed it. It is not by any means clear that on this evidence the prisoner could not be convicted of grand larceny. The money was the property of the firm, although in the possession of their servant, and, if taken from the servant without his consent, it would clearly have been a larceny. The assent of the servant would not alter the nature of the offence.

But if it amounts to nothing more than an embezzlement, the evidence is ample to sustain the charge against the prisoner of receiving the property of another, knowing it to have

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been embezzled, and the only ground on which the discharge of the prisoner is sought is, that the clerk was under eighteen years of age when the embezzlement was committed. If this be true, the crime of embezzlement could not be charged upon Little, and the prisoner would not, of course, be liable under that charge. The district-attorney now offers additional proof to show that Little is mistaken as to his age, and that he is over nineteen years of age. I think that such evidence may be taken now.

The 58th section of the Habeas Corpus act provides, "that if the prisoner appear to have been legally committed for the offence, or if he appear, by the testimony offered *with the return* or *on the hearing*, to be guilty, the court shall remand him," &c. This contemplates an examination of the evidence returned by the magistrate, or of evidence offered on the hearing, and allows such evidence then to be received.

Besides this, although I should discharge him on this writ, if the district-attorney has the necessary evidence, he could at once apply for a new committment on such proof, and it would be my duty to commit him anew thereon.

It would not be a creditable administration of justice to discharge a prisoner from custody on such a technical objection, when the district-attorney offers to supply the defect in the evidence, and produce sufficient testimony fully to establish the guilt of the prisoner.

The evidence may be received, and, on producing proof that the correct age of Little is over eighteen years, the prisoner must be remanded.

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SUPREME COURT.

OTIS C. SEYMOUR agt. CHARLES VAN CUREN and JOHN ADAMS.

Where a complaint alleges a cause of action, for wrongfully taking, carrying away and converting to the use of the defendants a horse; and demands relief for a judgment of \$1,500 besides costs, the action is for *damages* and not to recover *specific property*.

Hence, a requisition to the sheriff to take and deliver the horse, and proceedings thereon are irregular.

An order of arrest of the defendant obtained in such action under subdivision 3 of section 179 of the Code cannot be upheld, because it can only be granted under that provision when the action is to recover the possession of personal property.

On motion to set aside such proceedings the complaint cannot be amended, where no basis is laid for it, if it would otherwise be proper.

Monroe Special Term, July, 1859.

MOTION by defendants to set aside proceedings for the claim and delivery of personal property, and an order for the arrest of the defendants, &c.

J. McCONVILLE and J. L. ANGLE, *for defendants.*

L. H. HOVEY, *for plaintiff.*

T. R. STRONG, Justice. The complaint in this action is for wrongfully taking, carrying away, and converting to the use of the defendants the horse in question; and the relief demanded is a judgment for fifteen hundred dollars besides costs. The nature of the action is determined by the complaint, and particularly by the relief demanded; it is an action for damages and not to recover specific property. Proceedings for a claim and delivery of the horse are wholly unwarranted in the action, as such proceedings are confined to actions to recover the possession of personal property; hence, the requisition to the sheriff to take and deliver the horse and the

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proceedings thereon are irregular and must be set aside. (*Spalding agt. Spalding*, 3 *How. Pr.* 297.)

An order of arrest is allowable under subdivision 1 of section 179 of the Code, in an action "for wrongfully taking, detaining or converting property;" but the order in the present case was obtained under subdivision 3 of that section, which applies only to actions to recover the possession of personal property, and there is a material difference between an order under the latter and one under the former subdivision. When an arrest is made under subdivision 1, the defendant may be discharged from it on giving bail to the effect that he will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; but if the arrest is under the third subdivision, the defendant, to obtain his discharge, must give an undertaking with sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. The order in the latter case can only be upheld in the actions specified in that section, viz.: to recover the possession of personal property. It follows that the order of arrest must also be set aside.

It is said on the part of the plaintiff, that the complaint was prepared in its present form through inadvertence, but it must give character to the action, and no basis is laid for an amendment on this motion, if it would otherwise be proper.

The defendants are allowed \$10 costs of motion.

Frederick agt. Decker and Randall.

SUPREME COURT.

FREDERICK agt. DECKER and RANDALL.

Where an assignee of a judgment seeks to examine a judgment debtor, he should show in his *affidavit* that he has a right to proceed upon the judgment, and to move in the matter.

New-York Special Term, October, 1859.

INGRAHAM, Justice. One of the defendants was ordered to appear and be examined under proceedings supplementary to execution. The affidavit is in the usual form in the name of the plaintiff, made by C. D. Evans, Esq., as acting for plaintiff.

A motion is now made on affidavit of the plaintiff that he was paid the judgment by McKinstry, and had assigned the judgment to him and had never authorized these proceedings.

The defendant also swears to the transfer of property to McKinstry, to pay the note on which the judgment was recovered.

These allegations are denied by McKinstry, and he insists that the debt is due to him as assignee.

I am inclined to the opinion that where an assignee seeks to examine a judgment-debtor, he should show in his affidavit that he has a right to proceed upon the judgment as is stated in *Lindsay agt. Sherman* (1 *Code Rep. N. S.* 25, 232.)

But the case of *Orr*, in 2 *Abbott*, 457, seems to hold the contrary.

The affidavits as to payment of the judgment are contradictory. It is not advisable to decide that question on these papers, but it should be disposed of more properly by a motion to satisfy the judgment. If the defendant's affidavit correctly states the facts, the motion should be granted. To enable the defendant to make this motion, I direct all further proceedings on this order to be stayed until the 10th of November next, to which time the same is to be adjourned, if necessary.

SUPREME COURT.

JACOB SHARP agt. THE MAYOR, &c., OF THE CITY OF NEW-YORK.

The 5th section of the statute (*Laws of 1859, p. 1123*, entitled, "An act to enable the supervisors of the city and county of New-York to raise money by tax)," which provides that, "whenever the comptroller of the said city shall have reason to believe that any judgments now of record against the mayor, aldermen and commonalty of the city of New-York, or which may hereafter be obtained against them, shall have been obtained by collusion or founded in fraud, he is hereby authorized and required to take all proper and necessary means to open and reverse the same, and to use the name of the said mayor, aldermen and commonalty, and to employ counsel for such purpose,"

Held, not to be *unconstitutional* as containing matters not embraced in its title; because the other sections of the act connect the whole subject matter of the act with the fifth section.

The statute does not require that the comptroller should show by *affidavit* the grounds on which his opinion is formed of the existence of collusion or fraud.

The act being one for the benefit of the public, and intended to prevent fraud, should be liberally construed.

The making of the application by the comptroller, he being a sworn officer of the city, should be considered sufficient evidence in itself that he has reason to believe that the cause existed which the statute required, to warrant his action.

New-York Special Term, November, 1859.

MOTION by comptroller for an order of reference, &c.

WM. CURTIS NOYES, *for comptroller.*

D. DUDLEY FIELD, *for Jacob Sharp.*

RICHARD BUSTEED and WM. FULLERTON, *for the corporation.*

INGRAHAM, Justice. In this case a judgment was recovered against the defendants for damages, in consequence of a defect of title to certain portions of the slip now used for the Wall street ferry, amounting to \$40,953.56.

The comptroller of the city now moves for an order to open

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and review the judgment, under the provisions of the statute passed at the last session of the legislature.

The present motion is a preliminary one, asking for an order of reference, to furnish a statement and case showing the proceedings before him on the reference in this action.

The plaintiff and defendants, by their counsel, object to the authority of the comptroller to make this application on these papers.

This objection involves a construction of the statute under which the application is made. By this statute (*Laws of 1859, § 5, p. 1127*) it is provided as follows: "Whenever the comptroller of the said city shall have reason to believe that any judgments now of record against the mayor, &c., of New-York, or which may hereafter be obtained against them, shall have been obtained by collusion or founded in fraud, he is hereby authorized and required to take all proper and necessary means to open and reverse the same," &c.

The first objection taken to this motion is, that the act is unconstitutional, because it contains matters not embraced in its title. The title is, "An act to enable the supervisors, &c., to raise money by tax."

The second section provides for raising money to pay judgments then existing; the third section provides for raising money to pay judgments thereafter to be recovered.

It was necessary in making such provisions to enable the proper officers of the city to guard against the application of such moneys to the payment of any other judgments than those which were legally a charge against the city. The mode adopted for that purpose was immaterial. Whether the comptroller or any other officer was authorized to ascertain that such judgments were properly recovered before payment, it was a necessary incident to the previous provisions for their payment, and was intended to confine such payments to judgments fairly recovered against the city.

It was not a different subject, but a provision by which the city authorities, before paying the moneys to be raised by tax,

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should have the means of ascertaining that the judgments so paid were really due.

It was no more a violation of the constitutional provision on that subject, to provide for ascertaining before payment that the judgment was a valid judgment, than it was to insert a provision that the moneys so to be raised by tax should not be expended for any other purposes.

Both provisions were proper and necessary to confine the payments of the tax to the objects for which the moneys were intended to be raised. (4 *Selden*, 241.) It is also objected that, on the papers presented, the comptroller does not show a case entitling him to employ other counsel than the counsel for the corporation.

The affidavit, on which this motion is founded, is made by the comptroller, and states the recovery of the judgment on the report of the referee; that no consent was given to the reference; that the corporation counsel has declined to make a case or bill of exceptions, or take any steps to review the decision of the referee; that he believes the claim on which the action was based is unfounded and fraudulent, and that a good defence exists thereto. He further states that the recovery of such judgment requires the action of the comptroller under that statute, &c.

The right to make this application, and to employ special counsel therefor, depends upon this fact only, viz.: Whether the comptroller has reason to believe that any such judgment has been obtained by collusion or founded in fraud. What has caused such belief is not required to be stated, nor is it necessary for him to disclose, as a preliminary statement to authorize him to act, what was the operation of his mind in arriving at such a conclusion, nor what acts particularly led him to such a belief. The words used are so indefinite as almost to amount to an authority to the comptroller to act on his own judgment in any case.

Whether it is necessary for him to show by affidavit that he has come to the conclusion that there was collusion or fraud, is hardly necessary to be decided now. But, considering that

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the comptroller is a sworn officer of the city ; that the statute is a beneficial one, intended to protect the treasury against fraud, and only reaches judgments obtained by collusion or fraud, in my judgment it should be very liberally construed.

The application of the comptroller under such circumstances, even without an express charge of collusion or fraud, should be considered sufficient evidence, that he has reason to believe that the case on which he makes the motion comes within the provisions of the statute.

In this case, however, the affidavit of the comptroller shows affirmatively that he has reason to believe that the claim is founded in fraud, because he says in that affidavit, " that deponent believes that the claim upon which the action was based is unfounded and fraudulent."

Such a statement is amply sufficient to enable him to take the necessary steps to move the court as is provided for in that statute.

The object of this motion is to compel the referee to make a statement or case of the proceedings before him, and to furnish copies of the pleadings, papers, &c., used in the cause, or to compel the parties to furnish such copies.

I am not satisfied that such a case could properly be made for such a purpose.

The statute has provided a way in which the referee can be compelled to give evidence of any matter within his knowledge (if he refuses to do it voluntarily) by compelling him to appear before a judge of the court, or a referee, and submit to an examination under oath.

For the purpose of a motion, such is the only course which appears to be proper to obtain his testimony, a statement made by him, not under oath, could hardly be proper to be used as evidence. It is not within the ordinary duty of a referee, and could not be considered as rendered under the oath he took as referee.

Nor do I think the papers show a case warranting the order asked for against the parties as to copies of the papers. No application appears to have been made to the corporation

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counsel for such papers. They are public documents, most, if not all of them, properly belong in the department of which the comptroller is the head, and I cannot suppose that the corporation counsel would for a moment refuse copies of such papers to the comptroller if he applied therefor.

It is apparent from the correspondence which was read on this motion, that there was a difference of opinion between these officers as to the precise mode in which the comptroller should proceed, and from an unwillingness on the part of the counsel to allow another officer of the city government to control him in the management of what peculiarly belonged to his department, unless in the matters particularly provided for by law.

As that point has now been adjudicated by the court, I should be unwilling to believe that officer would refuse an application, on behalf of the comptroller, for such papers, but, on the contrary, as avowed on the motion, that he will furnish to the counsel all such papers on application therefor.

The plaintiff's counsel also referred to an opinion expressed by the comptroller, in one of his letters addressed to the corporation counsel, in which he stated that he did not know of any facts going to establish collusion or fraud, and urged that as a reason why this motion should be denied. It is sufficient to say, in answer to that objection, that such letter was written in July last.

What other facts have come to his knowledge since are not known, but when he states under oath, that he believes such claim is unfounded and fraudulent, I am bound to suppose that, since writing that letter, he has obtained information justifying him in making that allegation. My conclusions in regard to this statement are—

First. That the statute does not require that the comptroller should show by affidavit the grounds on which his opinion was formed of the existence of collusion or fraud.

Second. That the act, being one for the benefit of the public and intended to prevent fraud, should be liberally construed.

Third. That the making of the application by the comptrol-

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ler, he being a sworn officer of the city, should be considered sufficient evidence in itself, that he has reason to believe that the cause existed which the statute required to warrant his action.

I have avoided the expression of any opinion on the merits of this motion, because the same was not argued before me, and such opinion more properly belongs to the judge before whom the motion shall be brought on. I think, however, so much of the motion as asked for a postponement of the argument upon the merits until the necessary evidence from the referee can be obtained, should be granted.

To enable the counsel for the comptroller to obtain such evidence, the other motion should be directed to be heard on the 15th of November next, at 12 M. Copies of all affidavits and papers to be used thereon, in addition to those already served, to be served on plaintiff's attorney four days prior thereto. No costs granted on this motion.

SUPREME COURT.

THE BANK OF ATTICA agt. CHARLES WOLF and others.

"In all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them." (*Code*, § 306, *second clause*.)

Held, that this clause was intended to include *all actions*, whether of a legal or equitable nature, where the circumstances therein mentioned existed.

Therefore, where several defendants, sued as maker and indorsers of a promissory note, answered separately, and one of which succeeded on the defence of infancy, and taxed his costs and entered judgment against the plaintiff, of course, without any award of costs by the court, *held*, that he was irregular, and the judgment set aside.

Niagara General Term, September, 1859.

· GREENE, P. J., MARVIN and DAVIS, Justices.

Bank of Attica agt. Wolf

APPEAL from order of special term, denying motion to set aside judgment for irregularity.

The action was upon a note made by the defendant Wolf, payable to the order of one Corning, and indorsed by the latter and one Meach. The action was against the maker and the indorsers, and the defendants answered separately. Wolf obtained a verdict upon the trial upon a plea of infancy. The plaintiff had a verdict against the other defendants. Wolf procured his costs to be adjusted and entered judgment therefor against the plaintiff, without any award therefor by the court. A motion was made at special term to set the judgment aside. It was denied, and the plaintiff appealed to the general term.

L. K. HADDOCK, *for the plaintiff.*

W. H. CUTLER, *for defendant, Wolf.*

By the court—MARVIN, Justice. By section 304 of the Code, costs are allowed, of course, to the plaintiff, upon a recovery in an action for the recovery of money, when he recovers fifty dollars or more, and, by section 305, the defendant is entitled to costs, of course, in the actions mentioned in section 304, unless the plaintiff be entitled to costs therein. The action in this case is one of those mentioned in section 304, and the defendant was entitled to costs, of course, unless such right is affected and controlled by section 306. In that section it is declared, "In other actions costs may be allowed or not, in the discretion of the court. In all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them."

Prior to the amendment of 1851, the last clause of this section above given read, "when there are several defendants," &c. The amendment consisted in substituting the words, "In all actions where," for the word "when." In *Decker*

agt. *Gardiner and another* (4 Seld. 29), it was held by the court of appeals, that in an action of tort against two, and one of the defendants had a verdict, and the plaintiff a verdict against the other defendant, the defendant prevailing was entitled to costs, of course, under section 805 of the Code. This case was decided in 1853, but the question arose prior to the amendment of 1851.

In *Daniels agt. Lyons and others* (5 Seld. 549), a like decision was made in a like case, where the defendants had joined in a single answer. This case was decided in 1854, but it appears from the opinion of JOHNSON, J., that the question arose under the Code of 1849. I am not aware that any decision has been made by the court of appeals, giving construction to this section of the Code, since the amendment of 1851. I have been of the opinion that the amendment of 1851, substituting the words, "in all actions where," for the word "when," had not changed substantially the meaning of the section. But decisions have been made to the contrary, and I am inclined to think them correct.

In *Buckley agt. Bush and another*, the superior court of New-York held, that in an action for a malicious prosecution against several, the allowance of costs to a defendant who has answered separately, and succeeds upon the trial, rests wholly in the discretion of the court. This decision was made in April, 1853.

In *Butler agt. Morris, &c.* (1 *Bosworth's R.*), the action was against two joint makers of promissory notes. The defendants answered separately. Morris put in the plea of infancy, and succeeded upon this issue at the trial. The superior court of New-York expressed the opinion, that the chapter of the Revised Statutes, which includes the provision precluding one of several defendants in an action upon contract, against whom the plaintiff should fail to recover, from recovering costs, unless a certificate be given by the court, &c., that such defendant was unnecessarily and unreasonably made a party to the action, is superseded by the Code. And the court held that, under section 806, as amended in 1851, the judge at the trial could permit the plaintiff to discontinue the action without

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costs: The effect of the decision is, that now the costs in all actions, where one of several defendants, not united in interest, &c., succeeds against the plaintiff, are subject to the award of the court.

In *Williams's agt. Horgan and Horgan* (13 How. 138), Judge SLOSSON held, that by the amendment of 1851, the costs of one of several defendants not united in interest, &c., against whom the plaintiff fails to recover, could not be claimed as a right, but were in the discretion of the court whether the action were legal or equitable.

In *Ouyler agt. Coats and Coats* (10 How. 141), the action was upon a joint contract. One of the defendants pleaded infancy, and succeeded upon the trial. He entered judgment for his costs, and a motion was made to set it aside. The motion was denied by Justice WELLES at special term. He referred to *Hinds agt. Myers and others* (4 How. 356), as settling the question of the right of a defendant, who succeeds, to costs, when the plaintiff recovers against some of them, and fails as to others. He takes no notice of the amendment to section 306, though the decision was made in 1854, and it does not appear that the attention of the learned judge was called to the fact that the language of the second clause of the section had been changed.

I have noticed all the cases bearing upon the question referred to by the counsel, or which have come under my notice. The weight of authority is in favor of the position, that the legislature by the amendment of 1851, in section 306, intended to include *all actions*, whether of a legal or equitable nature, where the circumstances mentioned in that clause of the section existed, and without expressing any opinion whether the provision of the Revised Statutes above referred to (2 R. S. 616, § 20) is superseded, I am prepared to concur in the construction given by the superior court of the city of New-York to the second clause of section 306, so far as the question now under consideration is involved. It follows that the judgment in favor of the defendant Wolf, for his costs, entered without any award of the court, was irregular, and that it

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should be set aside, and he must be left to make application to the court for an award of costs.

The order of the special term should be reversed, and the motion granted setting aside the judgment, but without costs.

SUPREME COURT.

EDWARD H. JACOT agt. JAMES BOYLE and others.

An action brought by a judgment-creditor, to set aside, as fraudulent and void, several and separate conveyances of real estate, made to different grantees by the defendant, the judgment-debtor, so that the plaintiff can satisfy his judgment out of such property, contains but *one cause of action*, and the several grantees are proper parties defendants.

New-York Special Term, November, 1859.

DEMURRER to complaint.

SUTHERLAND, Justice. I think there is only one cause of action in the complaint, and that the defendants, Gray and Brown, were properly made defendants.

The plaintiff is a judgment and execution-creditor of the defendant Boyle. He has two judgments, the execution on one of which judgments had been returned unsatisfied, and the execution on the other, for \$1,642, remained in the hands of the sheriff unsatisfied.

The object of the action is to set aside two several conveyances of two several and separate parcels of real estate alleged to have been fraudulently made by Boyle to the defendants Gray and Brown, severally and separately, so that the plaintiff can satisfy his judgments out of the said real estate.

The plaintiff has a right to have his judgments satisfied out of all or any of the property of the defendant Boyle, and if the conveyances to Brown and Gray were fraudulently made at the time and with the intent alleged in the complaint, then

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notwithstanding the alleged conveyances, the real estate purported to have been conveyed remains and is the property of Boyle.

There is, therefore, only one cause of action in the plaintiff's complaint. In a legal sense there was only one wrong, and only one remedy is required, the wrong was in fraudulently preventing the plaintiff from reaching the property by his executions, and the remedy is to remove the fraudulent obstructions by declaring the conveyances void. If this remedy was not sufficient, but other or further remedies were needed to give the plaintiff complete relief, that is, to satisfy his judgments, the fact, that such other and further remedies were required or asked for, would not affect the question whether there was more than one cause of action.

The alleged fraudulent conveyances were made severally, for several and distinct parcels of real estate, to Gray and Brown, and they, as grantees claiming under the conveyances, were interested in the remedy asked for by the plaintiff, and were properly made parties defendant.

This is a sufficient answer to the first two grounds of demurrer. As to the third—on the ground that this court, "sitting in New-York," has not jurisdiction, because a portion of the real estate so alleged to have been conveyed fraudulently lies in Williamsburgh—it is simply frivolous. The jurisdiction of the court is co-extensive with the territory of the state, and where a cause of action shall be tried is mere matter of practical regulation. Besides, the remedy of this action asked for and required, is to declare *conveyances* void, not directly through a judgment in this action to deliver the property to the plaintiff.

The plaintiff must have judgment on the demurrer with costs, with liberty to the defendants, Brown and Gray, to answer in ten days on payment of costs.

SUPREME COURT.

WILLIAM ZINK and others agt. ISALAH ATTENBURG and others.

By the second clause of § 306 of the Code, in all actions, whether of a legal or equitable nature, where there are several defendants, *not united in interest*, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the *court must award*, to such of the defendants as have judgment, their *costs*—they are not entitled to costs of course. (*Bank of Attica agt. Wolf, ante, p. 102.*)

But, under the provisions of the same clause of said section (306), where such defendants *do not make a separate defence by separate answers*, but unite in a general denial answer, such as are entitled to judgment, when the plaintiff fails to recover against all, are entitled to *costs of course*, under § 305.

In an action upon a contract which is *in fact joint* only, there can be no recovery against one only of the joint contractors, except in cases where the defence is personal to one or more of the other defendants, as infancy, &c. But where several persons are made defendants, as upon a joint contract, and the plaintiff so declares in his complaint, but the *proof* shows that in point of fact only a portion of the defendants made the contract, the plaintiff can recover against such defendants as in fact were liable.

Niagara General Term, September, 1859.

Present, GREENE, P. J., MARVIN and GROVER, Justices.

ACTION for assault and battery.

The defendants joined in a general denial answer, and on the trial the plaintiffs obtained a verdict against the defendants other than Attenburg, as to him, the plaintiffs failed. He presented his costs for adjustment to the clerk, who refused to adjust them, the plaintiff objecting that Attenburg was not entitled to costs. Also, that he should first have obtained the order of the court allowing him costs. A motion was then made, at a special term, for an order directing the clerk to adjust the costs of Attenburg, and for such other or further order as to the court might appear just. The court ordered that the clerk, on the usual notice, receive and adjust the

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costs and disbursements of the defendant Attenburg. The plaintiffs appealed to the general term.

A. G. RICE, *for plaintiffs.*

W. A. MELOY, *for defendants.*

By the court—MARVIN, Justice. At the time I granted the order at the special term, I was of the opinion that the second clause of section 306 of the Code had not been substantially changed or enlarged by the amendment of 1851, substituting the words, "in all actions where," for the word "when," and that Attenburg was entitled to costs, of course, under section 305, the action being one in which, by section 304, the plaintiff would have been entitled to costs if he had succeeded. I have examined this question in another case presented on appeal, *The Bank of Attica agt. Wolf and others* (*ante*, p. 102), and have come to the conclusion, after examining the authorities, that the opinion I had formed was erroneous. I have concluded to follow the decisions of the superior court of New-York, cited in my opinion in the case just referred to. The result is, that now in all actions, whether of a legal or equitable nature, where there are several defendants, not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them; that is, such defendant is not in any case, in the circumstances specified, entitled to costs of course, but must apply to the court to award them.

In the present case, the action was assault and battery. The defendants were not united in interest. They did not, however, make separate defences by separate answers. What effect is this to have upon the question of *right* to costs? Is the defendant Attenburg in a better condition in relation to costs than he would have been if he had answered *separately*? He could defend as well under a joint denial answer as under a separate one, and this is so, I apprehend, in most cases. The learned judge, in *Williams agt. Hargan and Hargan* (13 *How.*

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Pr. R. 138), supposes that the second paragraph of section 306 was intended, so far as it applies to legal actions, for actions of *tort*, or for money demands arising on contracts several in their nature, or joint and several, and in which the answer of one defendant does not enure to the benefit of another, and so also in an action on joint contract, when one defendant sets up a defence personal to himself only, as infancy. He says when several are sued on a joint contract, and all or either deny the joint contracting, though by separate answers, the success of either enures to the benefit of the others, because the plaintiff cannot in such case have judgment against any, and he cites *Fullerton agt. Taylor* (6 *How. Pr. R.* 259), and the *Code*, § 274.

In *Fullerton agt. Taylor*, the action was against three defendants for work and labor. The referee found that the work was done for one of the defendants, and judgment was entered against such defendant alone. It was set aside at a special term, on the ground that as the action was joint against the three defendants, and upon a joint demand, there could be no judgment against one of the defendants only, though the evidence showed that the demand was, in point of fact, only against the one defendant. In other words, the learned judge followed the rule existing prior to the Code, that, in an action upon contract against several, the plaintiff must establish a joint cause of action against all or fail. As I understand, the case of *Fullerton agt. Taylor* has not been followed or regarded as law for many years past. I suppose the law to be, that in an action upon a contract which is *in fact* joint only, there can be no recovery against one only of the joint contractors, if the question is properly raised, except in cases where one of the joint contractors has a defence personal to himself, as infancy, &c.; one reason being that all contractors, who are joint only, have a right that each contractor should be made a party defendant with him. (See *Selkirk agt. Waters*, 5 *How.* 298.) I also suppose the law now to be, in a case where several persons are made defendants, as upon a joint contract, and the plaintiff so declares in his complaint, but the proof shows that in point

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of fact, only a portion of the defendants made the contract, the plaintiff can recover against such defendants as in fact were liable. That it does not now depend upon the allegations in the complaint, as to the joint liability of all the defendants, but upon the fact, whether they are all liable, and if some are liable and others not, the plaintiff may have judgment against such as the evidence showed to be liable. In short, that the decision of the referee in *Fullerton agt. Taylor* was entirely correct. (See *The People agt. Cram and White*, 8 How. Pr. R. 151, in which *Fullerton agt. Taylor* is examined. *Cowles and Curtis agt. Cowles*, 9 How. Pr. R. 361; *Brumskill agt. James*, 1 Kern. 294.)

The question still remains, as the defendant Attenburg did not make a separate defence by a separate answer, is he entitled to costs, as a matter of course, under section 305?

In *Daniels agt. Lyons and others* (5 Seld. 549), the action was for a trespass against five defendants. The plaintiff recovered against two, and failed as to the other defendants. They had all joined in one answer. The court held that the defendants succeeding were entitled to costs of course, under section 305. The question arose prior to the amendment of section 306, in 1851. The case is precisely in point, in the present place, unless the amendment of 1851 has effected a change in the law, extending to the precise point we are considering.

After considerable reflection I have come to the conclusion, that as Attenburg did not make a separate defence by a separate answer, he is not within the second clause of section 306, and that he, therefore, was entitled to costs of course, under section 305 of the Code, according to *Daniels agt. Lyons and others* (*supra*). In coming to this conclusion, effect is given to all the specifications contained in the second clause of section 306, and yet I am not very well satisfied with the result. That in a case where one of several defendants unites in a denial answer with his co defendants and succeeds, he is to have costs of course; but, if he makes a separate defence by a separate answer, he can only have costs if the court sees fit to award them to him. The order appealed from is affirmed.

Underhill, executor, &c., agt. Crawford and Mitchell.

SUPREME COURT.

JOHN B. UNDERHILL, executor, &c., of PETER UNDERHILL,
agt. ELIJAH CRAWFORD and MINOTT MITCHELL.

Where an action is brought by an executor, as executor upon an order of revivor in his name, and it appears on the trial that the order of revivor is standing in full force, such order is *conclusive* upon the judge at the trial that the action was properly revived and continued in the name of the executor.

Where a joint loan of money is made to two, the law, in the absence of any fact or circumstances, except the mere loan, would imply a joint promise to repay it; but if the lender agrees to take, and does take, the express promise of one of the two for the repayment, there is no room nor occasion for the law raising the joint implied assumpsit.

Where a loan of \$500 was alleged to be made to C. & M. jointly, and the lender accepted the note of C. for \$225, signed by M. as "surety," and the individual note of C. without being signed at all by M. for \$275, *held*, that the *legal presumption* was, that the \$500 was loaned to C., and that the lender agreed to look to him exclusively for the payment; such presumption was not conclusive, but might be rebutted by proof.

If the debt was the debt of C. alone, and M. was not originally liable, then any subsequent parol promise by M. to pay the \$275 note was void by the statute of frauds.

Where it appeared that there was not sufficient evidence to authorize the judge to submit the question, of M.'s original liability for the amount of the \$275 note, to the jury, *held*, where that question was submitted to the jury, that the defendant M. had a right to avail himself of the error on a motion for a new trial, he having objected to all the evidence given and offered on the part of the plaintiff to show his liability, and moved for a non-suit, which could not be granted because of the right of the plaintiff to recover on the other note.

New-York, Special Term, November, 1859.

MOTION for a new trial, by defendant Mitchell.

J. M. VAN COTT and WM. SILLIMAN, for defendant Mitchell.
P. Y. CUTLER, for plaintiff.

SUTHERLAND, Justice. As to three of the notes on which this action was brought, amounting at the time of the trial to

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\$1,424.75, there was no answer or defence by either of the defendants, and the plaintiff was entitled to a verdict for the amount of the three notes, and the judge before whom the case was tried was right in denying the motion for a non-suit, provided a recovery could be had in the name of John B. Underhill, as executor, in whose name, as executor, &c., the action had been revived on the death of Peter Underhill, the original plaintiff.

I think the order of revivor was at the trial conclusive upon the point, whether the action had been properly revived in the name of John B. Underhill as executor, and whether a recovery could be had in his name.

If the executor sold and transferred the notes before the order of revivor, so that, at the time the order was made, neither he, as executor, nor the estate of Peter Underhill had any interest in the continuance of the action, and for that reason the action should not have been revived in his name, then the defendants should have opposed the making of the order; or should have moved to vacate it on that ground; but the order standing in full force, was conclusive upon the judge at the trial, that the action was properly revived and continued in the name of the executor.

The plaintiff was, therefore, entitled to a verdict for the amount of the three notes not contested by the answer, and the judge could not dismiss the action or grant the non-suit.

As to the fourth note mentioned in the complaint, the question was, whether the defendant Mitchell was jointly liable with the defendant Crawford for the amount of that note, as so much money loaned and advanced to Mitchell & Crawford. Mitchell was not and could not be made liable on the note, for the note was made by Crawford alone, and was not signed by Mitchell.

The complaint, after setting out two dated notes made by Crawford & Mitchell, and claiming to recover the amount thereof, then states that the plaintiff, on the 3d day of July, 1841, loaned and advanced to the defendants \$500, which they agreed to pay to the plaintiff on demand; that they

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agreed to give the plaintiff therefor their joint and several notes payable on demand; and that, thereupon, "and for the consideration of the \$500 loaned and advanced as aforesaid," Crawford made two promissory notes, payable on demand, one for \$275, and the other for \$225, setting them out; that thereupon and at the time the notes were drawn, Mitchell signed his name to the \$225 note, as follows: "Minott Mitchell, surety," but neglected and omitted to sign the \$275 note; that the \$500 so loaned and advanced was paid to Mitchell with the express understanding that he should be held responsible; that the interest upon the \$500 included in the two notes had been paid by the defendants yearly, and every year up to May 1st, 1850, and the defendants, or one of them, had indorsed the payment of interest on each note when it was paid.

Mitchell in his answer denies that the \$500 was loaned to Crawford and him, and he denies that the \$500 was paid to him, and he denies sufficiently, and in form, I think, to put in issue, so far as material, all the other allegations of the complaint relating to the joint loan of the \$500, or the joint liability of the defendants therefor, or thereupon; except that he does not deny that he signed the \$225 note as surety, as alleged in the complaint; nor does he deny that he has paid interest on the \$225 and \$275 notes, but avers, that whenever he has paid interest on either of the notes, he paid it for Crawford, and at his request, taking Crawford's notes, shortly afterwards, for the same.

The question, then, under the pleadings was, as to the joint liability of the defendants for the amount of the \$275 note upon a joint loan.

It may be, that the plaintiff was entitled to a verdict against Crawford for the amount of the \$275 note, either on the note or for so much money loaned to Crawford; but Mitchell could not be liable unless the loan of the \$500 was a joint loan to him and Crawford.

And conceding that the loan was to Crawford and Mitchell, and not to Crawford alone, Mitchell was not liable for the amount of the \$275 note, if Peter Underhill who loaned the

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money, at the time he loaned it, intended to take and did take the individual note of Crawford for the \$275, intending and agreeing to look to Crawford's note and Crawford's individual responsibility for re-payment of the money.

On a joint loan of money to two, the law, in the absence of any fact or circumstance, except the mere loan, would imply a joint promise to repay it; but if the lender agrees to take and does take the express promise of one of the two for the re-payment, there is no room or occasion for the law's raising the joint implied assumpsit.

But as the answer of Mitchell in this case, instead of admitting a joint original loan and averring that the lender agreed to take the individual note of Crawford, and look to him alone for payment, denies the joint loan, and does not specifically set up any such agreement, I am inclined to think that, under the pleadings, the question of Mitchell's liability for the amount of the \$275 note must depend upon the question whether the loan was originally joint or not.

Now, as the complaint alleges that the \$500 was loaned at one time and as one loan, the acceptance by the lender of the \$225 note, signed by Mitchell *as surety* without objection, was *prima facie* evidence, irrespective of other allegations in the complaint, not only that the \$225, but that the whole \$500 was loaned to Crawford, and not to him and Mitchell.

The same remark will apply to the acceptance of the \$275 note signed by Crawford only.

The evidence on the trial was, and it appears to have been a conceded fact, that the \$500 was paid to Crawford and not to Mitchell, as alleged in the complaint, and that Mitchell was not present when the money was paid to Crawford.

Nor do I find the least evidence of the allegations in the complaint, that the defendants promised to give their notes for the \$500, and that Mitchell omitted and neglected to sign the \$275 note; or that Mitchell was ever asked or promised to sign the \$275 note.

Crawford, the co-defendant of Mitchell, swore, in general words, "that the \$500 was a loan to us jointly by Peter

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Underhill," without stating that Peter Underhill so understood it, or any fact or circumstance to show that Peter Underhill so understood it. For aught that appears, Crawford was only swearing to his legal conclusion and what he thought.

The only evidence on the part of the plaintiff, in addition to this, to show even that the loan was a joint loan to both defendants, was the oral testimony of Crawford, and certain documentary evidence to show that the \$500 was paid by Crawford to Mitchell to be used by him to discharge their joint liabilities and for their joint use and benefit, and was, in fact, so used, and the testimony of the plaintiff's attorney, Dusenberry, who testified, after the four notes on which the action is brought were placed in his hands for collection, that he had several conversations with Mitchell, in which Mitchell promised to pay the notes and offered to pay the interest; but, on his cross-examination he stated, that nothing was said about the note not signed by Mitchell as distinguished from the other notes; that he did not call Mitchell's attention to it.

To contradict Crawford, and to explain the fact of some of the indorsements on the \$275 note being in Mitchell's handwriting, and to show, from business transactions and relations between him and Mitchell, that even the subsequent use of the \$500 for their joint benefit, as testified to by Crawford, would have been consistent with the presumption arising from the notes, that the original loan was to Crawford, and on his responsibility alone, certain evidence, oral and documentary, was offered on the part of Mitchell, a part of which was received and a part rejected.

Without noticing particularly the exceptions taken on the part of the defendant to the rejection of this evidence, I think the learned judge who tried the cause erred in submitting the question of the liability of the defendant Mitchell, for the amount of the \$275 note, to the jury. I do not think the evidence, which was given and received on the trial, under the pleadings, authorized him to submit that question to the jury.

The legal presumption, from the acceptance by the lender of the \$275 and \$225 notes, was, that the \$500 was loaned to

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Crawford, and that the lender agreed to look to him exclusively for the payment. This presumption was not conclusive, but might be rebutted by proof.

That Mitchell subsequently participated in the use of the money borrowed would seem rather to give an occasion for an application of the legal presumption, than to disprove it.

The subsequent use or application of the money was immaterial, if Mitchell was not originally liable as borrower.

If the debt was the debt of Crawford alone, and Mitchell was not originally liable, then any subsequent parol promise by Mitchell to pay the \$275 note was void by the statute of frauds.

If the testimony was admissible to show an original liability, the promises proved by Dusenberry, under the circumstances, had little if any weight.

The testimony of Crawford, that the \$500 was loaned and advanced to him and Mitchell, should, I think, under the pleadings and the other facts and circumstances of the case, have been looked upon as a mere statement of his legal conclusion.

Upon the whole, although I think the charge of the judge would have been well enough had there been sufficient evidence to authorize him to submit the question of Mitchell's original liability for the amount of the \$275 note to the jury, yet I think he erred in submitting that question to the jury at all; and I think Mitchell has a right to avail himself of that error on this motion for a new trial.

He excepted to the whole charge—he objected to all the evidence given and offered on the part of the plaintiff to show his liability, and he moved for a non-suit which could not be granted, because the plaintiff had an undisputed right to recover against him on three of the notes.

I cannot avoid the conclusion, from a careful examination of this whole case, that the trial below was a second same attempt (for it appears that there had been a trial before), on the part of the plaintiff, to make the defendant Mitchell liable on the \$275 note which he never signed, by evading the statute

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of frauds, and trying to get rid of the plain legal presumptions arising from the unexplained intentional acceptance by Peter Underhill of the \$225 note signed by Mitchell as surety, and of the individual \$275 note of Crawford for the \$500 loaned.

My conclusion is, that there should be a new trial, with the costs of this motion for a new trial to abide the event, unless the plaintiff elects within ten days to take judgment against the defendants for the amount of the three notes signed by Mitchell with costs, exclusive of the costs on this motion, for a new trial. If the plaintiff so elect, then the motion for a new trial is denied without costs to either party on such motion.

I think the plaintiff is entitled to judgment against the defendant Crawford alone, for the amount of the \$275 note signed by him alone.

SUPREME COURT.

THE PEOPLE *ex rel.* JOHN LENT agt. **HIRAM W. HASCALL**,
Clerk of Genesee county.

By the laws of 1859 (*ch.* 360), *Notaries Public* are authorized to take proof and acknowledgments of deeds, &c., "in all the cases where" commissioners of deeds may do those acts within their jurisdictions. That is, they may perform such duties in their respective counties, whether there are any commissioners of deeds appointed for such counties or not.

Wyoming Special Term, October, 1859.

DEMURRER to the return of the respondent to the alternative mandamus.

The return and demurrer thereto present simply the question, whether notaries public are authorized, by chapter 360 of the Laws of 1859, to take proof and acknowledgments of deeds, &c., in counties in which there are no commissioners of deeds?

BISSELL & BALLARD, *for the relator.*

BANGS & HINSDALE, *for the respondent.*

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DAVIS, Justice. By the first section of the act entitled, "An act authorizing notaries public of the state of New-York to perform the duties now performed by commissioners of deeds, passed April 15th, 1859," (*Laws of 1859, chapter 360*), it is enacted that, "in addition to their present powers, notaries public of this state are hereby authorized to administer oaths and affirmations, and to take the proof and acknowledgments of deeds, mortgages, and any other papers for use or record in this state, in all the cases where the same may now be taken and administered by commissioners of deeds, and under the same rules, regulations and requirements prescribed to commissioners of deeds, and such notaries' acts may be performed without official seal."

The object of this statute is to supply a supposed public want; it is, therefore, remedial in its character, and entitled "to be construed largely and beneficially, so as to suppress the mischief and advance the remedy." (*Dwarris on Statutes, page 682.*)

The powers conferred by this act are given to the "notaries public of this state, and not to those of particular localities;" but it is argued, that the words, "in all the cases where the same may now be taken and administered by commissioners of deeds, and under the same rules, regulations and requirements prescribed to commissioners," operate to limit the exercise of those powers to notaries public who reside in the cities (or at least in the counties) in which there are commissioners of deeds. This argument confounds the "*cases*," in which commissioners of deeds may administer oaths and take acknowledgments, with the *places wherein they must perform those acts*. Commissioners of deeds are local officers. They must discharge their duties within specified territorial limits. (1 *R. S., Banks & Brothers, 5th edition, 382, 383.*) But the duties themselves are general in their character, and when performed within the proper local jurisdiction are operative throughout the state. These commissioners are vested by statute with general powers to administer oaths and affirmations, and take proofs and acknowledgments of deeds (3 *R. S., same edition,*

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473, 474, 475), and may exercise these powers in every case coming before them within their local jurisdiction, without respect to the residence of the parties for whom they act, or the place where their certificate is to be used. A commissioner of deeds, in the city of New-York, may administer an oath in that city to a resident of Buffalo, to an affidavit to be used in the latter city; and he may take proof or acknowledgment of a deed of lands situated in Erie county, to be recorded there. The instrument in this case, if the party acknowledging it had been in one of the cities of the state, might, upon proper proof of his identity, have been acknowledged there; and this illustrates that it is one of "*the cases*" where commissioners of deeds may act. In all such cases, the same powers the commissioners of deeds possess are by the act under consideration conferred on the "notaries public of this state." Nor does the provision of the act, that notaries shall use their powers "under the same rules, regulations and requirements prescribed to commissioners of deeds," limit the powers conferred, to officers of special localities. It simply operates to restrict notaries public in the performance of these new duties to their local jurisdictions, and to the formalities as to proof of identity, rates of fees, &c., that are imposed upon all commissioners of deeds. Notaries public are also local officers, but within their counties may perform duties, the operation of which is co-extensive with the state. (*Statutes above cited, ibid.*) By the act of 1859, they may now within their local jurisdictions, in addition to their former powers, administer oaths and affirmations, and take proofs and acknowledgments "in all the cases where" commissioners of deeds may do those acts *within their jurisdictions*; subject, however, to the rules and regulations, as to proof of identity, forms and fees, that are by law prescribed to the last-named officers.

The relator is, therefore, entitled to judgment on the demurrer, and to a peremptory mandamus.

SUPREME COURT.

JAMES V. RICH 'agt. WILLIAM N. LOUTREL.

Where, in an action between partners to dissolve and settle the partnership accounts, a receiver is appointed, who takes possession of the partnership property, which has been previously levied upon by the sheriff on executions issued upon judgments obtained prior to the appointment of such receiver, the receiver will be required to first pay the amount of such executions to the sheriff, out of the property in his possession. (*This agrees with, and follows the decision of the case In the Matter of the North American Gutta Percha Company, 17 How. 549; and is adverse to Rutter agt. Tallis, 5 Sand. 610.*)

New-York Special Term, October, 1859.

MOTION to compel receiver to pay certain judgments.

INGRAHAM, Justice. This action was between partners to dissolve and settle a partnership.

On the 7th of May, 1859, a motion was made for a receiver and an order of reference made to appoint a receiver. On the 27th of May, the receiver was appointed by an order of the court, and he took possession of the partnership effects.

On the 16th of May, 1859, McSpedon & Baker recovered a judgment against the defendant for \$204.80, and an execution issued to the sheriff.

On the 14th of May, 1859, Smith and Peters recovered a judgment against the same defendants for \$140.56, and on same day an execution was issued to the sheriff. Under these executions the sheriff levied on sufficient property to pay the same.

On the 24th of June, McSpedon & Baker recovered another judgment and issued execution to the sheriff.

After the appointment of the receiver, he took from the sheriff the property on which he had levied under the order of the court, and the plaintiffs in those actions now move for an order directing the receiver to pay those judgments, in

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which motion the sheriff unites. Other judgments were afterwards recovered as stated in the petition, but further reference to them is not necessary.

The judgments recovered prior to the appointment of a receiver, and under which executions had been levied on the defendant's property prior to that time, are entitled to be paid. This point was expressly decided by the general term of this district *In the Matter of The North American Gutta Percha Company* (17 Howard, 549). Although, in that case, the order appealed from, denying the motion, was affirmed, on the ground that the sheriff did not unite in the application, Mr. Justice DAVIES, in delivering the opinion, distinctly states that the judgment should be paid, and that the sheriff could make application for an order to that effect.

A contrary opinion was expressed in *Rutter agt. Tallis* (5 Sand. 610), upon the ground that the title of the receiver related back to the date of the order of reference in analogy to the former practice in the court of chancery.

I feel, however, controlled by the opinion expressed in the case above referred to in this court, and also concur in that decision. The plaintiffs in those executions by the actual levy obtained a priority of which they ought not to be deprived by the appointment of a receiver in such an action. If the proceeding had been taken by a prior creditor, another question would be presented. But in this action between the defendants themselves, if the judgment-creditors could thus be deprived of their liens, the partners by collusion might defeat such creditors and retain the proceeds of the property by at any time discontinuing their action. It was intimated in the case in the superior court, that the court would not permit such a suit to be discontinued. But, by the rule of this court, the action could be discontinued on filing the consent to discontinue, and no order of the court is necessary.

As regards the judgments recovered after the appointment of the receiver was perfected, no lien was acquired by the issue of the executions, and there is no reason to order their payment. Those creditors must take other proceedings to com-

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pel the proper application of the partnership property to the payment of the debts of the firm.

Motion granted, directing the receiver to pay to the sheriff the amount due on the several executions held by him and levied on the defendant's property, prior to the date of the receiver's appointment.

SUPREME COURT.

LEVI C. HARRIS, respondent, agt. STANLEY HAMMOND and JOSEPH BURNS, appellants.

Where the plaintiff brought his action upon a promissory note for \$100, against two defendants, and one of them put in an answer alleging that the note was given for the price of a horse purchased by him of the plaintiff, and a breach of warranty by the plaintiff as to the soundness of the horse, and after issue joined, this defendant commenced an action against the plaintiff in a justice's court, for false representations on the sale of the horse (including the same matter in the answer), and recovered judgment against the plaintiff for \$100,

Held, that an order made at special term on motion of the plaintiff, striking out the defendant's answer, and directing judgment for the plaintiff on the note, be affirmed, notwithstanding an appeal from the justice's judgment was then pending.

Monroe General Term, September, 1859.

Present, T. R. STRONG, SMITH and JOHNSON, Justices.

APPEAL from an order.

H. R. SELDEN, *for appellant.*

J. L. ANGLE, *for respondent.*

By the court—T. R. STRONG, Justice. This action is upon a promissory note for \$100 and interest. The answer is, that the note was given upon the sale of a horse by the plaintiff to Hammond, and a breach of warranty by the plaintiff on the sale, of the soundness of the horse. After issue was joined,

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Hammond commenced an action against the plaintiff before a justice of the peace, for a fraudulent representation of the soundness of the horse, manifestly embracing the same matter as the warranty, and the defendant therein put in an answer, among other things, denying the complaint.

The latter action was brought to trial, when Hammond recovered judgment for one hundred dollars, besides costs. An appeal has been brought by the defendant in that action—the plaintiff in this—to the county court, from that judgment, which appeal is still pending. After the appeal was taken, the plaintiff in the present action moved at special term for an order striking out the answer of the defendant in this action, or for leave to make a supplemental reply setting up the judgment before the justice as a bar to the matter of the answer. An order was granted striking out the answer and directing that the plaintiff have judgment in the action; and the case is now before the court on an appeal from the order.

The defendant, Hammond, was not precluded, by the answer in this action setting up a breach of warranty, from commencing an action before a justice for a fraudulent representation as to the same matter. (*Fabricotti agt. Launitz*, 3 *Sand. S. C.* 743, 745.) But the judgment in the latter action is clearly a bar to the cause of action on the warranty. The warranty and fraud, as to the same thing, formed but a single cause of action, enforceable at the election of Hammond, by action on the warranty or for the fraud. A recovery in one of those modes is a bar to another action.

The fact, that an appeal has been brought, does not affect the conclusive nature of the judgment as a bar, while it remains unreversed.

In regard to the appropriate relief to the plaintiff, it is obvious that an order, allowing him to make a supplemental reply setting up the bar, would have been proper and adequate. But I do not perceive why the form of relief adopted at special term was not allowable, in the discretion of the court, there being no dispute in regard to the facts, and no room for doubt as to the law of the case.

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There is another answer to this appeal. The appeal is from the order. The order strikes out the answer and directs judgment for the plaintiff. It is an order for judgment. The rights of the parties are finally determined, and judgment is directed. Such an order does not belong to the class of orders embraced by section 349 of the Code; it is rather the judgment in the action, reviewable only on appeal from the judgment when perfected. (*Bauman agt. The New-York Central Railroad Company* (10 How. 218).

I am, therefore, of opinion that the order should be affirmed.

SUPREME COURT.

OCTAVIA BOYCE, by her next friend, &c., agt. THE CITY OF ST. LOUIS, and others.

Where a *municipal corporation* claims real estate as devisee under a will, the will must not only have been executed and attested according to the forms and solemnities prescribed by the law of the *situs*, but the claimant must by the law of the *situs* be capable of taking by *devise*, no matter what may be the law of the domicil of the testator or devisee, or where the will was executed.

If the claimant is a *foreign corporation* claiming as devisee, then not only the capacity of such corporation to take and hold real estate as devisee, but by its charter, is to be determined by the law of the *situs*.

Therefore, where the *City of St. Louis*, in the state of Missouri, claimed real estate situated in the state of Missouri, and also in the city of New-York, as devisee under a will made and executed according to the laws of Missouri by the testator, who was a resident, and who died in St. Louis,

Held, that it was for the courts of this state to determine whether the city of St. Louis had, as devisee, any right or interest in or to the lands in New-York, of which the testator died seized, and for that purpose to give construction to its charter; as it was for the courts of Missouri to determine the same questions as to the lands in Missouri of which the testator died seized; according to the local law in either case.

It was also *held*, that the city of St. Louis could not take and had no right or interest in the real estate in New-York, for the reason, 1st. Because by its charter it was not authorized to take or hold such real estate, either upon the trust,

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or for the use or purpose mentioned in the will, or for any other use or purpose.

2d. Because, by the law of this state, in force when the testator died and his will took effect, and still in force, no devise to a corporation could be valid, unless such corporation was expressly authorized by its charter, or by the statute, to take by devise.

It seems, that if the city of St. Louis had been expressly authorized by its charter or by a statute of Missouri to take by devise, it could not take or hold the real estate in New-York as devisee, in contravention of the law of this state. (*The case of Beekman agt. The People*, 27 Barb. 272, commented upon and dissented from in part.)

New-York Special Term, November, 1859.

ACTION for partition.

R. M. HARRINGTON, *for plaintiff.*

DANIEL LORD, *for the City of St. Louis.*

M. S. BIDWELL, *for infant defendants, &c.*

SUTHERLAND, Justice. This is an action for partition of certain real property in the city of New-York, of which one Bryan Mullanthy, late of the city of St. Louis, in the state of Missouri, died seized, leaving him surviving, as his only heirs-at-law, five sisters.

Since his death, one of the sisters has died leaving a husband and several children her surviving.

The parties to this action, other than the city of St. Louis, are the four surviving sisters and their husbands, and the surviving children and husband of the deceased sister.

The city of St. Louis is made a party defendant, as claiming one equal undivided third of the real property sought to be partitioned, under an alleged last will and testament of the said Bryan.

The city of St. Louis in her answer sets up such last will and testament, and a devise and bequest to her by it, of one undivided third of all the testator's property real and personal.

A copy of an instrment in writing, purporting to be such last will and testament, is produced on the hearing; and it is admitted by the parties, that the will of the said Bryan, re-

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ferred to in the answer, was by him executed in such form of law, as to subscribing, publishing and attestation, as was sufficient to devise real estate in this state, and that he was in law competent to devise; and by stipulation between the parties such copy was read in evidence in the place of the original.

By the will, the testator leaves to the city of St. Louis one equal undivided third of his property, real, personal or mixed, "to be and constitute a fund to furnish relief to all poor emigrants and travellers coming to St. Louis, on their way *bona fide* to settle West."

There is no testamentary disposition of the other two-thirds of the testator's property.

He also died seized of various lots and parcels of land in Missouri, some of them lying within and some of them without the limits of the city of St. Louis.

The testator at the time of his death was a resident of St. Louis, and domiciled there; and the will was executed, and he died there.

In an action or proceeding instituted in the "St. Louis Land Court," for the partition of the real estate in Missouri between the heirs-at-law, to which the city of St. Louis was made a party, that court adjudged that the city of St. Louis was entitled to, and could take and hold, as devisee under the will, the third of such real estate in Missouri.

The plaintiff in this action insists that the city of St. Louis has not the legal capacity to take or hold the said bequests or devises to it made, or the legal capacity to receive or carry into effect the trusts therein created; and that it has not by its charter the power or capacity to take or hold the property so bequeathed or devised to it.

The city of St. Louis insists preliminarily, that these questions cannot be contested or properly determined in this partition suit; but if they can, then she insists upon her right to take and hold as devisee under the will, and she further insists, that the adjudication of the Missouri court, on the question of her capacity to take and hold as such devisee under her charter, should control this court.

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I have no doubt that the city of St. Louis was properly made a party in this action, and that it can properly be determined in this action, whether she has any right or interest in or to the real estate thereby sought to be partitioned. Her claim is antagonistic, but she is not in possession.

As to the adjudication of the Missouri court on the question of the capacity of the city of St. Louis to take as devisee under the will, and the effect or authority it should be permitted to have here, it is necessary to advert to the principle of the common law, that a title or right in or to real or immovable property can be acquired, enforced or lost, only according to the law of the place where such property is situated, the *lex rei sitae*.

This principle applies as well to the capacity of the claimant to take or hold the real estate, as to the sufficiency in form or effect of the instrument, title or evidence of title, under which the claim is made or sought to be enforced. (*Story on Conf. of Laws*, §§ 428, 430, 474; *Nicholson agt. Leavitt*, 4 *Sandf.* 276; *Hosford agt. Nichols*, 1 *Paige*, 226; *Chapman agt. Robertson*, 6 *Paige*, 627.)

If the law of the *situs* excludes aliens from holding lands, then an alien cannot take, no matter what may be the law of his domicile. If the claimant claims as *devisee*, then the will must not only have been executed and attested according to the forms and solemnities prescribed by the law of the *situs*, but the claimant must by the law of the *situs* be capable of taking by *devise*, no matter what may be the law of the domicile of the testator, or devisee, or where the will was executed.

If the claimant is a foreign corporation claiming as devisee, then not only the capacity of such corporation to take and hold real estate as devisee, but by its charter, is to be determined by the law of the *situs*.

Of course it belongs to the courts of the state or country where the real estate is situated, to declare and apply the law on the question of the capacity or right of the claimant.

This principle of local jurisdiction and of the application of the local law to real estate, results from the independent sov-

ereignty of states or countries, and from settled principles of international law.

In England and in this country the principle may be said to be practically without an exception; and so far has the principle been carried in England, that in a recent case (*Birchwhistle* agt. *Vardil*, 7 *Clark and Fin.* 895), the opinion of the court of king's bench, that a son, born of Scottish parents before marriage in Scotland, who was afterwards legitimized by the subsequent marriage of his parents there, could not as heir inherit lands in England, because, by the law of England, affirmed by the statute of mortmain, no one could be heir or inherit lands, unless born within lawful wedlock, was after two arguments affirmed by the House of Lords.

In the United States, the sovereignty of the several states is qualified by the constitution of the United States, and in certain cases the supreme court of the United States has concurrent jurisdiction with the state courts even as to real estate; but in exercising such jurisdiction, the supreme court of the United States follows and applies the state law, and adopts the well-settled judicial interpretation by the state courts of the state law. Applying this principle to this case, it is clear, that it is for the courts of this state to determine, whether the city of St. Louis has as devisee any right or interest in or to the lands in New-York, of which the testator died seized; as it was for the courts of Missouri to determine the same question as to the lands in Missouri, of which the testator died seized; according to the local law in either case.

Without raising the question, whether a foreign corporation, in the absence of any law of this state to the contrary, has the same right to take and hold land in this state that it has in the state where it was created, but conceding such right, it is clear, as to real estate in this state, claimed by such foreign corporation, that it is for the court of this state to construe its charter, and determine whether it is authorized by its charter to take or hold such real estate, (*Nicholson* agt. *Leavitt & Sandf.* 276, *Sup.*), and that an adjudication upon the question of its corporate capacity, by a court of another state, can and ought

to have no further effect or authority, than the reasoning upon which it may have been founded gives it.

In this case, the proceedings and judgment of the Missouri court, in the action or proceeding instituted in Missouri for the partition of the real estate of which the testator died seized in that state, appear, from a transcript thereof, properly authenticated; but the grounds upon which the decision was made do not appear.

I am of the opinion that the city of St. Louis could not take, and has no right or interest in, the real estate sought to be partitioned in this action, for two reasons.

1st. Because by her charter she is not authorized to take or hold such real estate, either upon the trust, or for the use and purpose mentioned in the will, or for any other use or purpose.

2d. Because, by a law of this state, in force when the testator died and his will took effect, and still in force, no devise to a corporation could be valid, unless such corporation was expressly authorized by its charter or by statute to take by devise.

As to this second reason, it is sufficient to refer to the law (3 *Rev. Stat.*, 5th ed., 138, § 3), and to say that the city of St. Louis is not expressly authorized by its charter to take by devise, and that it does not appear that there is any statute of this state, or of the state of Missouri, authorizing it to take by devise.

I do not mean to intimate, if the city of St. Louis had been expressly authorized by her charter or by a statute of Missouri to take by devise, that she could take or hold the real estate in question as *devisee*, in contravention of the law of this state.

As to the other reason or ground upon which I put my decision, it is only necessary to transcribe that portion of the charter giving the power to take and hold property.

By the charter, the city of St. Louis "may purchase, receive and hold property, real and personal, within said city, and may sell, lease or dispose of the same for the benefit of the city, and may purchase, receive and hold property, real and

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personal, beyond the limits of the city, to be used for the burial of the dead of the city, also for the erection of water-works to supply the city with water, and also for the establishment of a hospital for the reception of persons infected with contagious and other diseases, also a poor-house, work-house or house of correction, and may sell, lease or dispose of such property for the benefit of the city, and may do all other acts as natural persons," &c.

It will be seen at a glance, that not only are the purposes for which she may purchase, receive and hold property beyond the city limits particularly specified and limited, but also, that the property, if real estate and beyond the limits of the city, must be near enough to the city to admit of its being used or held for one or more of the specified purposes.

It would appear, that by the charter she is not authorized to take or hold real estate in New-York for any purposes; certainly not for any or either of the purposes specified in the charter, nor do I think she is authorized by the charter to receive or hold property, within or without the city, in trust for the charitable use and purpose mentioned in the will of the testator.

A corporation derived from prescription, and resting upon the common law for its powers and capacities, may have quite undefined powers as to taking and holding real estate, and in other respects; but I take it to be a well-settled principle of law, that a corporation, created by a legislature, has no other powers than those expressly granted by the legislature, and such as are necessary to carry into effect those expressly granted. (*The People agt. Utica Insurance Co.*, 15 John. 850; *The New-York Firemen's Insurance Company agt. Ely*, 2 Cow. 678.)

The specification in this charter of the uses or purposes for which the city of St. Louis can purchase, receive and hold property beyond the limits of the city, and the grant of an express power by it, to purchase, receive and hold property beyond the limits of the city for these purposes, and within the city *for the benefit of the city*, imply a prohibition against taking

or holding property without the city, except for one or more of the specified purposes, and even within the city except for the benefit of the city. (*Cases last cited, and Jackson agt. Hartwell*, 8 John. 422; *Trustees agt. Peaslee*, 15 New-Hampshire, 317.)

My conclusion is, therefore, that the city of St. Louis could not, and did not take, as devisee under the will of Bryan Mul-lanthy, any right, estate or interest, in or to, the real estate sought to be partitioned in this action.

But, although the city of St. Louis had not capacity to take, before the case of *Owens agt. The Missionary Society* (14 New-York R. 380), there might have been a question whether the charitable intention and purpose of the testator in making the devise might not be carried into effect with the aid of the statute of 43d of *Elizabeth*. I assume, however, that it is settled by that case, if the city of St. Louis had not the capacity to take, that, as it respects the real estate in this state, such charitable intent and purpose cannot be carried into effect.

The result must be, that all the estate and interest which the testator had in the lands sought to be partitioned in this action, at the time of his death, on his death vested in his heirs-at-law, as if he had made no will.

I do not think, that the provision of the Revised Statutes, abolishing uses and trusts, except as authorized and modified therein (1 *Rev. Stat.* 727, § 45), affects the question of the validity of this devise, or would prevent the trust and charitable use and purpose, upon and for which, the devise was made, from being carried into effect, even as to the real estate in this state.

I do not agree with what is said to that effect in *Ayres agt. Methodist Episcopal Church*, 3 Sandford, 371; *Yates agt. Yates*, 9 Barb. 324; *Beekman agt. The People*, 27 Barb. 272 to 279, and in one or two other cases. When the opinion in *Beekman agt. The People* was delivered, I announced my dissent from that portion of the opinion, stating at the same time that I agreed in the conclusion to which Judge DAVIES had arrived, and briefly the grounds upon which I so agreed, which mainly

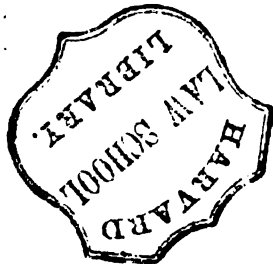
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were, that the testator in that case having bequeathed no particular sum for the dispensary, and having given no directions as to the amount to be used in its establishment, but leaving the amount wholly at the discretion of his executors, and the bequest of the surplus being a bequest of the surplus remaining after the establishment of the dispensary, and the executors having renounced the trust, I could not see how the court could appoint new trustees *and authorize them to exercise the discretion which the testator had given to his executors*; that for the court to do so, it appeared to me, would in effect be making a will for the testator.

I make this statement here, certainly rather out of place, because the opinion of Judge DAVIES has been published in a pamphlet form and reported as the opinion of the court; whereas not only did I dissent, but I understood Judge CLERKE, also, to dissent from that portion of the opinion above referred to.

I think the views of the late Assistant Vice-Chancellor SANDFORD, expressed in *Kniskern agt. Lutheran Church*, and in *Shotwell agt. Mott*, 1st and 2d Sandford's Ch. R., on the question of the application of this provision of the Revised Statutes to charitable uses, are the right views.

I think, too, it is fairly to be inferred from the cases of *Williams agt. Williams*, and *Tucker agt. St. Clemens' Church* (4 *Selden*), that the court of appeals approved of the views of Vice-Chancellor SANDFORD, expressed in the two cases before mentioned; and that the case of *Tucker agt. St. Clemens' Church*, which was a case of real estate, on a close examination, must be conceded to be a decision on the very question.



SUPREME COURT.

THE PEOPLE agt. ABRAHAM DAVIS.

A request to charge on the *facts* in a criminal trial is very properly refused by the judge.

Where an indictment, on allegations of certain facts, charges the defendant with "assault and battery, with intent to kill," and on the trial a general verdict is rendered of "guilty of an assault and battery, with intent to kill," the verdict is one finding a crime of *assault and battery* only, where the indictment omits to allege some of the means which the statute names of an intent to kill: That is, "by means of a deadly weapon, or by such other means or force as was likely to produce death."

District-attorneys, in framing indictments for the crime of outrageous assault and battery, should insert a count on which a conviction that will send the prisoner to the state prison may be had, without calling on the jury to *presume or find, from weak circumstances*, that some unknown deadly weapon was used.

Albany General Term, September, 1858.

Present, WRIGHT, GOULD and HOGEBOM, Justices.

WRIT of error for a new trial.

By the court—GOULD, Justice. As I understand the prisoner's different requests to charge, they were requests to charge on the *facts*; and were properly refused. And as to the first one, where the judge said, "the evidence was sufficient," it is perfectly apparent from the connection that he meant merely sufficient to go to the jury.

But there are inherent in the case much more serious difficulties in the way of this conviction of a felony. The third count of the indictment, to make it in itself good, should have after the word "kick," the words, "with such force as was likely to produce death." And then a general verdict of "guilty of an assault and battery, with intent to kill, *as charged in the third count of the indictment*," would probably be good. And it is worth the while of every district-attorney to observe this point; and in framing his indictments for cases of assault and battery, so outrageous as plainly was that in this case, to

The People agt. Davis.

insert a count on which a conviction that will send to the state prison may be had, without calling on the jury to presume, or find from circumstances, hardly warranting such finding, that some unknown deadly weapon was used.

The offence is strictly a statute offence. (2 R. S. 665, § 36.) "Every person, who shall be convicted of any assault and battery upon another, by means of any deadly weapon, or by such other means or force as was likely to produce death, with intent to kill, &c., shall be punished," &c. And no one can doubt that were a strong man to strike, with but his fist, a heavy blow on the head of a mere child, thereby inflicting severe injury and intense suffering, whether causing or not causing imminent danger to its life, he would clearly be within both the letter and the spirit of committing an assault and battery, "by such force as was likely to produce death," and eminently worthy of the state prison, for the longest term the law names.

Still, unless the indictment were framed to meet the case, there could be no such conviction. And merely charging "an intent to kill," without setting forth some one of the *means* which the statute names, will not warrant a conviction of any offence higher than an assault and battery. And in this light, I am unable to see that the verdict is really one finding any grade of crime above an assault and battery; the words, "with intent to kill," having added to them no reference to the indictment, whereby the finding could be eked out with the statute requisites, are merely nugatory. The true and proper way of finding a verdict, in a case properly charging the statute intent, would be, "that the prisoner was guilty of the assault and battery with a deadly weapon, with intent to kill;" or, "by such force as was likely to produce death, with intent to kill," the person assaulted, &c. And the very least that would make a good verdict of guilty of the higher crime would be, "guilty of an assault and battery, with intent to kill, as *charged in the indictment.*"

Viewing this verdict, then, as one of guilty of assault and battery, I see no course to be taken with it, but that sen-

tence be passed for that offence. There has been no error for which a new trial should be had, nor is there any conviction of a felony. But there is a perfectly valid conviction of the lesser offence.

UNITED STATES CIRCUIT COURT.

WILLIAM H. WELLS agt. THE SCHOONER ANN CAROLINE.

It is a settled general rule of navigation, that when two sailing vessels are approaching each other on opposite tacks, both having the wind free, the one on the larboard tack must give way and pass to the right.

But this rule should not prevail when, as in this case, it appeared by the weight of evidence, that the course of the vessel on the starboard tack was to the leeward, and somewhat astern of the other, and by suddenly coming around on her starboard tack produced a collision.

New-York, September, 1859.

APPEAL by libellant from a decree of the court below.

BENEDICT, BURR & BENEDICT, *for libellant and appellant.*

MR. DONOHUE and MESSRS. OWEN & VOSE, *for respondent.*

NELSON, C. J. The libel in this case was filed by the owner of the schooner John C. Wells against the schooner Ann Caroline, to recover damages for a collision occurring in the month of February, 1854, on the eastern shore of Delaware Bay. The two vessels were beating up the bay in company with several other vessels, in a channel about a mile wide, between Crow Shoal and the Jersey shore. The wind was N. N.W., about five or six knot breeze; the tide flood, setting up the bay. The John C. Wells was close-hauled on her larboard tack, which was her long tack from Crow Shoal to the Jersey shore; the Ann Caroline close-hauled on her starboard tack on the opposite course from the Jersey shore to Crow Shoal.

Wells agt. The Schooner Ann Caroline.

The Wells was very heavily laden—the Ann Caroline in ballast. The two vessels had tacked at the Crow Shoal upon their long tack nearly at the same time, the Caroline at the time being to the leeward of the Wells and somewhat astern of her. The Ann Caroline ran out but one half or two-thirds of her course, when she suddenly came round on her starboard tack, in consequence of a vessel ahead suddenly backing and obstructing her course. While on this course she came in collision with the Wells, striking her on her starboard side aft, about ten or fifteen feet from her taffrail, opening her side, and from which injury she sank to the bottom of the channel in a few minutes.

The main ground upon which the defence of the Ann Caroline is placed is, that she was on the starboard or privileged tack, and that it was the duty of the Wells to give way and pass to her right. The controlling question in the case is, whether or not the Wells was to the windward, and so far above the course of the Caroline, before the two vessels came together, as to forbid the application of this settled rule of navigation, that when two vessels are approaching each other on opposite tacks, both having the wind free, the one on the larboard tack shall give way and pass to the right. On looking into the proofs in the case, which are very voluminous, it will be found that the testimony of the master and hands on board of the respective vessels, as usual, is contradictory—those of the Wells claiming that the course of the Caroline was to the leeward and southerly of that of their vessel, while those on the Caroline insist that her course was to windward of the Wells.

If the case stood upon the testimony of these witnesses, we should regard it as so far conflicting and doubtful as to lead us not to interfere with the decree of the court below dismissing the libel. But there are four witnesses, masters and hands upon other vessels, engaged at the same time in beating up this channel, and who were on the same tack with the Wells, but to the leeward and a little to her stern, who witnessed the collision and the course of the vessels previous to the accident,

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and they all concur in confirming the testimony of the master and hands of the Wells as to the course and relative position of the two vessels. The testimony of one of these witnesses has been taken in this court and was not before the court below, which is very explicit and direct upon this question. There were several considerations urged on the argument by the counsel on both sides in support of their respective views of the case, which, as they rest principally upon a controverted state of facts, we do not deem it important to notice. We must, therefore, reverse the decree of the court below, and direct a reference to a commissioner to take proofs, and report upon the libellant's damages in the case.

SUPREME COURT.

McCarthy agt. PEAKE.

Where two suits are commenced in different courts, and the subject of the action and the parties are the same in each, the court, which first acquires jurisdiction, should dispose of the whole matter.

Therefore, where two partners commenced a suit, each against the other, to close up the partnership, and to enjoin his partner from interfering with the partnership effects, one in the superior court, by procuring a temporary injunction on the 14th of September, which, with the summons, was served on the 15th of Sept. about 3 P. M., and the other commenced in this court by obtaining an *ex parte* order for a receiver, who took possession of the property on the 15th Sept., and afterwards, about 8 o'clock same day, the summons and injunction were served,

Held, that the action commenced in the superior court, by the allowance of an injunction, on the 14th Sept., conferred on that court jurisdiction, and gave it priority. The appointment of a receiver was of no more weight than the allowance of the injunction—both were provisional remedies, and either would give jurisdiction.

Where an *injunction* is ample to protect the property from loss until a motion can be made for a receiver, it is manifestly improper to deprive a partner of the possession of partnership property *without notice*, and even without being served with a summons.

McCarthy agt. Peake.

New-York Special Term, September, 1859.

MOTION to set aside injunction and to stay proceedings.

INGRAHAM, Justice. The parties to this action were partners. In consequence of differences between them, each party commenced proceedings to close up the partnership, and to enjoin his partner from interfering with the partnership effects. Peake commenced proceedings in the superior court, and McCarthy in this court. In the superior court a temporary injunction was granted on the 14th September, which, with the summons, was served on McCarthy on the 15th inst., about 3 P. M. In this court McCarthy commenced his action, and obtained, on an *ex parte* application, an injunction, and an order for a receiver, and the receiver took possession of the property on the 15th September, and afterwards, about 8 o'clock of the same day, the process in the action and the injunction were served on the defendant. A motion is now made to set aside the injunction in this case, and to restrain further proceedings therein, mainly upon the grounds that the superior court had obtained jurisdiction of the parties and subject matter before the application to this court, and that the appointment of a receiver on an *ex parte* application before service of a summons was irregular.

The subject of the action, viz., the partnership effects, and the parties, viz., the two partners, are the same in both actions, and, under the decisions which have repeatedly been made in this court and the superior court, the court which first acquires jurisdiction of the case should dispose of the whole matter; and, after such jurisdiction is obtained, any other court, in which subsequent proceedings are taken for the same purpose, should, as well from feelings of amity as from a desire to avoid a conflict of jurisdiction, restrain the further prosecution of the second action. This rule, however, is not to be extended beyond the subject matter of both actions, and would not apply where other parties were made litigants.

The question, then, in this case is, which court first obtained jurisdiction of the case.

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By section 139 of the Code, it is provided that the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings, from the time of the service of the summons or the allowance of a provisional remedy. In the case of issuing an attachment against a non resident debtor, it has been held, that such jurisdiction was obtained at the time the attachment was issued. In either case, whether the allowance of the injunction or the service of the summons is to be considered as conferring jurisdiction, it is clear that the action in the superior court has the priority. The injunction there was granted on the 14th, and in this court on the 15th September. The summons in the action in that court was served about 3 o'clock on the 15th, while the summons in the action in this court was served about 8 o'clock of the same day. The appointment of a receiver was of no more weight than the allowance of the injunction. Both were provisional remedies, and either would give jurisdiction of the case to the court in which the action was brought. In the present case it may well be doubted whether the appointment of a receiver before service of the summons, and without notice to the defendant, could be sustained. There are cases of a peculiar character where such an order may be made, but the cases are of such a nature as to require immediate action, such as those in which the party to be restrained is an idiot or lunatic, or where for any cause the immediate action of the court is required to save the property from destruction; but where an injunction is ample to protect the property from loss until a motion can be made for a receiver, it is manifestly improper to deprive a partner of the possession of partnership property without notice, and even without being served with a summons.

As I am of the opinion that the superior court had jurisdiction of this matter before any proceedings were taken in this court, this motion must be granted. The motion for a receiver and for an injunction by the court can be obtained by the defendant from that court on putting in his answer, as well as in this court, and the interests of both parties can be much better pro-

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tected by either court in one action than by cross suits between the same parties, necessarily tending to produce a conflict of jurisdiction between the two courts.

As the receiver has expended money in protecting their property, and for other purposes connected with it, by order of the court, it is proper that he should be paid; and the motion is granted on condition that the defendant pay his expenses and compensation for the services rendered. The costs of this motion to abide event.

UNITED STATES CIRCUIT COURT.

JOHN DE BRUNS and others agt. JOHN J. LAWRENCE.

JOHN J. LAWRENCE agt. THE BRIG LIEUTENANT-ADMIRAL
COLLINBERG.

The master of a vessel is *quasi agent* for both parties (owner or consignee of the cargo and the owner of the vessel), in respect to the cargo found in a perishing condition on board the ship; and his acts, honestly put forth in an emergency, even if not the most suitable and well judged, with the intent to the best interests of all concerned, are to be indulgently considered.

This principle applied to this case, where a cargo of fruit, from Palermo, arrived in New-York in a damaged and perishing condition, in consequence of inherent decay, by reason of a long voyage caused by storms and putting in for repairs, &c., which was alleged to have been unnecessarily protracted by the master, and in his unskillful management of the cargo.

New-York, September, 1859.

APPEALS from decrees of the court below.

OWEN & VOSE, for the Brig Lieutenant-Admiral Collinberg.

BEEBE, DEAN & DONOHUE, for John J. Lawrence.

NELSON, C. J. The first of these suits was brought to recover freight on a shipment of fruit, from Palermo to New-

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York, in the brig Lieutenant-Admiral Collinberg: the second, a cross-suit by the consignee, to recover for damages to the fruit in the course of the voyage. The bill of lading contained the usual exceptions—damages of the sea, &c., and also from the liability to inherent decay. The brig sailed from Palermo on the 16th of December, 1855, and arrived at New-York on the 20th of May, 1856, after a passage of over seventy days. She encountered a storm on the voyage, and was compelled to bear away to the port of Lisbon, in Portugal, for repairs, where she was delayed some forty-seven days in refitting, and where a survey of a portion of the fruit which was perishable (700 boxes of lemons and 2,150 boxes of oranges) was directed, and which were all discharged from the ship, and placed in a well ventilated warehouse on shore. The boxes were opened and examined, and the fruit found to be decaying. The unsound were separated from the sound, and then repacked with care. A quantity equal to 414 boxes of the lemons and oranges was found to be so far decayed as to be worthless—the greater proportion oranges. On the arrival of the ship at this port, almost all of these, however, were in a very damaged condition. It is not denied on the part of the counsel for the consignee, but that the damage was occasioned by the natural and internal decay of the articles, but it is insisted that the fault of the master in the course of the voyage contributed to this damage.

I. It is insisted, that the length of time occupied in making the repairs at Lisbon was unnecessary and unreasonable, and that this delay was occasioned by the carelessness and want of energy and activity of the master, and that it contributed to the damage of the fruit; and,

II. That the opening of the boxes of fruit at Lisbon, and the handling of it, in separating the sound from the unsound and repacking the same, had a tendency to increase the decay of the article, and manifested a want of proper skill in taking care of the fruit in the course of the shipment, and contributed to the damage. The court below overruled these positions, and held upon the proofs that the master had not been guilty

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of any culpable omission of duty in the voyage, which caused the loss or deterioration of the fruit, or that the delay of the vessel in Lisbon, where she put in for repairs, beyond the time reasonably required to obtain them, was the immediate or proximate cause of the injuries the fruit had sustained, and that it being proved that the efforts of the master in Lisbon to preserve the fruit were made in good faith, and under the advice of experienced and competent persons, and according to the best judgment of the master, the vessel was not responsible for the injuries the fruit received, even if the means used to save it were not the most suitable and well judged; the master was quasi agent for both parties in respect to the cargo found in a perishing condition on board of his ship; and his acts, honestly put forth in the emergency, with the intent to the best interests of all concerned, are to be indulgently considered.

We have looked into the evidence in this case, and although it is contradictory, and, in respect to the time consumed in the repairs at Lisbon, not very satisfactory, we think the weight of it sustained the view of the court below. We admit it is difficult to understand or believe that some three weeks should be consumed at Lisbon in refitting the vessel, when the work could have been done in this port in as many days. And the evidence returned to the commissioner executed in Lisbon explains it fully, not, however, in a manner very creditable to the character or enterprise of the government of Portugal.

We are satisfied that the decrees of the court below are right, and should be affirmed.

Graham agt. Harrower.

SUPREME COURT.

GEORGE GRAHAM agt. GABRIEL T. HARROWER and DANIEL
B. BISSELL.

Where the defendants, in an action for taking from the possession of the plaintiff and converting personal property, put in a general denial, and for a further defence justify the taking and selling the property by one of the defendants as sheriff, by virtue of a certain execution against the former owner of the property—the defendants, on the trial, will not be allowed to prove that the goods were levied upon by the sheriff (one of the defendants), under *another execution* before the plaintiff claimed title to the property.

If the defendant had made such a levy, and thereby acquired a right to take the property, it was incumbent on him, if he would avail himself of that right, in his defence, to set forth the special facts connected with it in his answer.

Where there is *any evidence* authorizing the *inference of a sale* of personal property sufficient to submit that question to the jury, it is a sufficient *consideration*, and the court can not be called upon to charge the jury that a *specific consideration* is necessary to be proved to authorize the sale.

Monroe Special Term, September, 1857.

MOTION by defendants on a case for a new trial.

MONELL & WILLARD, *for defendants.*

WM. IRVINE, *for plaintiff.*

T. R. STRONG, Justice. It is alleged in the complaint, that the defendants wrongfully took from the possession of the plaintiff and carried away the goods in question, and afterwards converted the same to their own use.

The defendants in their answer say, they have not knowledge or information sufficient to form a belief, whether the defendants wrongfully took the goods from the possession of the plaintiff, or whether the goods were his property, and therefore they deny the same; and, for a second defence, justify the taking and sale of the goods under an execution in favor of Suydam, Reed & Co., against E. R. & E. L. Payne—the owners of the goods prior to the plaintiff.

Graham agt. Harrower.

It was proved at the trial that the goods were taken and sold under such an execution, the goods being, at the time of the levy, in the possession of the plaintiff, who claimed title to the same. The deputy sheriff testified that he had two executions against the Paynes at the time. The defendants proposed to prove that the goods were levied upon by the sheriff, one of the defendants, under an execution, before the plaintiff claimed title to the goods. This was objected to, and the objection was sustained.

This offer of proof had reference to some other execution than the one in favor of Suydam, Reed & Co., as it appeared that execution was issued the 18th of January, 1855, and it had been fully proved when the offer was made that the plaintiff was, at that time, in the actual possession of the goods, and selling them by retail as a merchant.

I think it was not competent, under the general denial in the answer, to prove a prior levy under another execution. If the defendant had made such a levy, and thereby acquired a right to take the goods, it was incumbent on him, if he would avail himself of that right in his defence, to set forth the special facts connected with it in his answer. It is against the whole policy of the provisions of the Code relating to pleading, to allow a party to be surprised at the trial by such special matter. Assuming that, under such pleading, the general title may be shown to be in the defendants, it is not, I am satisfied, allowable to prove such a mere special property in them as was proposed to be shown in this case.

The single question submitted to the jury was, whether, as between the Paynes and the plaintiff, the title to the goods had passed to the latter. There was evidence that the Paynes had been in business, as merchants, in the store where these goods were about a year before the plaintiff commenced business there as a merchant; that they left the store and the goods in question therein, and the plaintiff took possession thereof some eight days before the levy; that the plaintiff employed clerks, and from the time of taking possession to the levy was engaged in selling the goods in the store by re-

Graham agt. Harrower.

tail, claiming to be the owners; and there was no proof that the Paynes, who resided in the same village, during the eight days or afterwards, asserted any claim, or made any objection, or in any way interfered with the business of the store. I am satisfied it was the duty of the court, upon this evidence, as was done, to submit the question of the sale to the jury; and that their finding thereon cannot properly be disturbed. If the Paynes had sued the plaintiff as a wrong-doer for selling those goods, it is clear to my mind that the latter would have been entitled, on such evidence of title as in this case, to have a verdict of a jury upon the question, whether he was not the owner of the goods by purchase of the Paynes; and that a verdict in his favor would be final. So, if the Paynes had sued the plaintiff to recover the value of the goods, as for goods sold and delivered, they might, upon such proof, require the case to be submitted to the jury; and a verdict of the jury, finding a sale, would not be set aside as against evidence.

The court was requested to charge the jury, that it was necessary, to entitle the plaintiff to recover, that he should prove he gave some consideration for the goods. The proposition involved, as I understand it, is, that some further evidence, proving a consideration specifically, was required to establish a sale by the Paynes to the plaintiff. I think this position cannot be supported. Any evidence, authorizing the inference of a sale, would prove a consideration as well as any of the other elements of a sale.

No question of fraud was raised, and of course no evidence was given or offered to such a point in the case.

In my opinion, the motion for a new trial should be denied, with costs.

NOTE.—Affirmed on appeal—WILLES, SMITH, and JOHNSON, Justices.

Harlay agt. Ritter and wife.

NEW-YORK COMMON PLEAS.

HARLAY agt. RITTER & WIFE.

In an action against *husband and wife*, where the husband is joined in right of his wife—that is, where the action concerns the separate estate of the wife—it is not now necessary, as it was under the former practice, that *application be made to the court* for the wife to answer *separately*. She may now answer separately, of course, and without such application.

New-York Special Term, November, 1859.

MOTION to strike out the separate answer of the wife of defendant Ritter.

BRADY, J. It is a general rule in equity, that, in a suit against husband and wife, the husband must procure the joint answer of himself and wife to be put in; and if either party wishes to answer separately an order should be first obtained allowing it. (*Barbour Ch. Pr.*, 1 Vol., 150; *Leavitt agt. Cruger and wife*, 1 *Paige Ch. Rep.*, 421; *New-York Chemical Co. agt. Flowers and wife*, 6 *Paige*, 659; *Smith's Ch. Pr.*, 1 Vol., 252.)

It is stated by *Smith*, however, on the same page cited, that a wife is entitled to put in an answer separately from her husband on three grounds:

1. If the husband and wife are made defendants in right of the wife.

2. If the husband and wife live separate and apart.

3. If the husband is out of the jurisdiction; and that, though an order is necessary to allow the separate answer, it will be granted as matter of course, on motion or petition, predicated on either of the grounds above mentioned. The cases above cited from *Paige* were foreclosures, and, under the Code, I have not been successful in finding but three cases bearing upon the question suggested. (*Erickson and another agt. Vollmer, &c.*, 11 *Howard Pr. Rep.* 43; *Young agt. Seeley and wife*, 12 *id.* 395; *Arnold and others agt. Ringgold and wife*, 16 *id.* 158.)

Harlay agt. Ritter and wife.

In the case in the 11 *Howard*, the action did not concern the separate estate of the defendant's wife. The object of the action was, to set aside a conveyance executed by the defendant, the wife having only an inchoate right of dower. The wife could not have answered separately, without authority to do so by order of the court, thus recognizing the equity rule in existence prior to the Code. In *Youngs* agt. *Seeley and wife*, the action was brought to set aside a conveyance to her as fraudulent and void. Her husband was united with her, and put in an answer which was not verified by her. It was held, that the answer should have been verified by her, and that, if the deed was valid, the plaintiff had no claim in the premises, and that her right under it would amount to a separate estate, which she would have a right to dispose of under the statutes of 1848 and 1849, independently of her husband. The statutes of 1848 and 1849 have enlarged the rights of married women in reference to the ownership and possession of real estate; but, by the usages and laws of the colony and state of New-York, a married woman could convey her lands or any interest therein by deed, although her husband did not join therein. (*Albany Fire Insurance Company* agt. *Bay, &c.*, 4 Com. 9.)

And she was regarded in equity as a *feme sole*, in reference to her power over her separate estate. Taking into consideration the independent position of a married woman in this state, as to her separate property, there seems to be no reason for adhering to the rule in equity, which requires leave of the court to be obtained before a separate answer can be put in by a *feme covert*, where the action is not based upon any instrument jointly executed by herself and husband; and where, as in this case, she claims an exclusive right to the estate sought to be appropriated to the payment of her husband's debts. Having the power to hold her separate estate as a *feme sole*, she should be permitted to defend her title in that capacity, and to enjoy, as other suitors, all the privileges and rights pertaining to courts of justice, not as a favor, but as an absolute right. In one case in this district, the right of a married wo-

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man, sued in reference to her separate estate, to demur separately without leave of the court, has been decided. (*Arnold, &c., agt. Ringgold, &c., supra.*)

By section 114 it is provided, that when a married woman is a party her husband must be joined with her, except in cases where the action concerns her separate property, and where the action is between herself and her husband. It follows, therefore, that in actions against a married woman, in reference to her separate estate, the husband must be joined, and that the husband is made a defendant in right of the wife. As we have seen, in such cases, the wife may answer separately, as matter of course, on application. (*See Ch. Pr., supra.*)

The Code (§ 157) provides, that if there be several parties united in interest, and pleading together, the verification to the pleading may be made by one of such parties acquainted with the facts. In this case the husband and wife are not united in interest, and a verification by the husband, of a joint answer, would not be sufficient. (*Youngs agt. Seeley and wife, supra.*)

It thus appears that the wife held her separate property as if she were a *feme sole*; that, when sued in reference to it, although her husband must be joined with her, an answer put in by him for her would not be good without her verification, and that, in cases where the husband is joined as a defendant in right of his wife, she may answer separately as matter of course, if she apply for leave to do so. However harmonious with the old practice, which originated during the existence of the more severe legal doctrines in relation to a married woman, her estate, and her being, there seems to be no reason for the longer continuance of the rule requiring her to ask leave of the court to answer, when the action concerns her separate estate, and, in my opinion, such a rule would not only impose the performance of an idle ceremony, but would impair her right to enjoy and protect her separate estate in the manner, and to the extent and purpose, designated by the legislature. And I think, as well, that it would not be in accordance with the spirit of the Code, which was to "simplify" as

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well as "to abridge the practice, pleadings and proceedings of the courts of this state." For these reasons the separate answer of the defendant Sarah Ritter was, in my judgment, properly made in this case, and it is my opinion that the motion to strike it out should be denied, but, as the question is novel, without costs to either party.

Order accordingly.

COURT OF APPEALS.

BELL agt. McELWAIN.

A promissory note made and delivered for the purpose of assisting to form a mutual insurance company, under the act of 1849 (*Laws of 1849*, p. 441), is absolute, and payable at all events without any assessment. That is, such notes are ordinary promissory notes, available for all the purposes for which such notes are usually available. (*This decision follows that of White agt. Haight*, 16 N. Y. R. 310.)

(It appears that whenever the court of appeals finally decides a case, it intends to follow and adhere to the decision; and whenever subsequent cases involving the same principle are brought before it, they will be decided entirely upon the authority of such former decision, without further reasoning or argument by the court. Although this rule is well settled and generally understood by the courts, there are occasionally some singular exceptions.—[REP.]

September Term, 1859.

APPEAL from a judgment of the supreme court.

JOHNSON, Ch. J. The note, on which the plaintiff's claim in this case rests, is in its terms, in all material respects, identical with that which came under adjudication in *White agt. Haight* (16 *New-York Rep.* 310), and the extraneous facts, so far as they have any bearing on the defendant's liability, are also in substance the same. The question, therefore, is merely whether we shall follow or overthrow that decision?

White agt. Foster.

It was ably argued by counsel thoroughly persuaded of the justice of their respective views, and there is no sort of foundation for the idea thrown out in the opinion of the supreme court, that the case passed to judgment without ample and earnest discussion by counsel. It was considered elaborately by this court, and the judgment received the assent of all the members of the court save one.* I see no more ground for considering the point decided as now open to review, than could be alleged in respect to every decision ever made in this court.

The judgment should, therefore, in accordance with that decision, be reversed, and judgment rendered on the case for the plaintiff for the amount of the note and interest.

* That one was Mr. Justice PAIGE, who took no part in the decision, for the reason that he had given a written opinion as counsel on the questions in controversy, before his election to the bench.

COURT OF APPEALS.

JUSTUS WHITE, Receiver of the Union Insurance Company,
respondent, agt. JAMES G. FOSTER, appellant.

HENRY R. MYGATT, *for respondent.*

BROOKS & TOMLINSON, *for appellant.*

This action was decided at the same time as the aforesaid case of *Bell agt. McElwain*. The action was on a note in form like to that in *W hite, receiver, agt. Haight*, and said note formed part of the original capital stock of said company. Judgment was rendered for the plaintiff at the Chenango circuit, and affirmed in the 6th district at general term. On the argument of the appeal in this court, it was contended that the note was not in the form required by the statute, and the appellant's

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counsel relied upon the recent opinions delivered at general term in the fourth judicial district, in one of which opinions the court upon rumor, by JAMES, P. J., in regard to the decision of *White, receiver, agt. Haight*, say, "that but one side was fully argued on the appeal," and that "a strong impression prevails that the appellate court was imposed upon, and its decision obtained without having given the question a full and thorough examination."

The court of appeals affirmed the judgment in this case, for the reason stated in *Bell agt. McElwain*.

SUPREME COURT.

THE PEOPLE *ex rel.* McSPEDON & BAKER agt. THE BOARD OF SUPERVISORS OF THE COUNTY OF NEW-YORK.

It seems, that where public bodies are called to answer an *alternative mandamus*, it is the better and wiser course not to rely upon objections to the writ which are of a purely *technical* character, not involving the merits, but to meet the writ by an examination of the merits of the controversy at once.

A return to an *alternative mandamus* is bad in form, which leaves the defence to be *inferred* from the facts stated, instead of a distinct averment to that effect. An argumentative return is always bad.

It is not necessary that *all* the commissioners of records should sign the *certificates* given for amounts due upon contracts. It is enough that they are signed by a majority of them.

It is a universal rule, subject only to statute exceptions, that in all cases where a public duty is to be performed by a specified number, although all must have notice of the meeting, the acts of a majority are binding.

The *alternative mandamus* in this case commanded the respondents to raise by tax a certain sum, to pay the relators the moneys then due them in relation to their contract with the commissioners of records, and to enable them to perform their contract, &c., showing that only a *portion* of the amount claimed to be raised by tax was *then due* to the relators, a portion of the work only having been performed. *Held*, that the relators claimed and the writ demanded too much. Judgment for respondents.

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New-York Special Term, November, 1859.

MOTION to strike out portions of the return to an alternative mandamus, and for a peremptory mandamus, &c.

JOHN W. EDMONDS and JAMES T. BRADY, *for relators.*

A. R. LAWRENCE, JR., *for respondents.*

INGRAHAM, Justice. An alternative mandamus was issued in this matter, commanding the respondents to raise by tax a sum exceeding \$193,000, to pay the relators the moneys now due them in relation to their contract with the commissioners of records, and to enable them to perform their contract, &c., or show cause why the same should not be raised, &c.

On the return of this writ, the respondents submit various objections thereto in their return.

The plaintiffs now move to strike out this return, or portions thereof, and for a peremptory mandamus, or for leave to demur.

Many of the objections taken to the granting of this writ are of a purely technical character, not involving the merits, and are such as should not be relied on by the board of supervisors in refusing to carry out the provisions of law defining their duties in regard thereto. It is wiser for public bodies, taking such a course, to sustain their action by an examination of the merits of the controversy at once, instead of postponing such discussion by resorting to objections upon mere matters of form. As, however, they are made part of this case, it is my duty to pass upon them as presented, so far as may be necessary to decide this motion. The return denies that McSpedon & Baker, the relators, ever obtained, or had in their possession, certificates of the commissioners of records for any amount due them on their contract.

The first and second paragraphs of the return would form a general denial of the allegation that the relators had such a certificate, were they not qualified by the 3d, 4th, 5th and 6th sections, which set out the election of Miner as register; that he was *ex officio* one of the commissioners, and that he did not sign the certificates.

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Taken together, these six paragraphs can only be construed as averring that Wm. Miner was one of the commissioners of records, and did not sign the certificates.

In form it is bad, because it leaves the defence to be inferred from the facts stated, instead of a distinct averment to that effect. An argumentative return is bad.

I think it is bad also in substance. It is not necessary that all the commissioners should sign the certificates. It is enough that they are signed by a majority of them. That appears to be the case as to all the certificates. The commissioners should all have notice of a meeting for the purpose, in order that all may consult together; but it is not in the power of any one, who may be dissatisfied, in this way to prevent the payment of what would be a just claim.

In all cases where a public duty is to be performed by a specified number, although all must have notice of the meeting, the acts of the majority are binding. This rule is universal, except where the statute expressly requires the assent of all, and there is no good reason why it should not as well apply to a certificate to be given after the work has been performed, as to a resolution authorizing the contract for it in the first instance.

There are other objections to this return which would be worthy of examination, were it not that for other reasons the relators are not entitled to the peremptory mandamus, and even if the return should be quashed, the motion for such writ should not be granted.

The alternative writ shows that only a portion of the amount claimed to be raised by tax is due to the relators, and claims that the whole amount is required in order to perform and complete the contract. It is clear, therefore, that at present the relators have no right to this fund, except the portion due for work already performed. They may never complete the contract, and never be entitled to any further payment. The rule is, I think, well settled that a relator cannot have a peremptory writ, unless he shows a clear legal right to what he

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asks for. (*People agt. Supervisors, &c.*, 1 Kernan, 563 ; *People agt. Canal Board*, 13 Barb., 444, are cases so holding.)

It will not be pretended that these relators at the present time have any such claim. Whether they will have or not at a future period any such claim, is uncertain. It may not be required during the year, and in case of a non-performance on their part might not be needed at any time on this contract.

Whether they could apply for a mandamus as to the amount now due them, is a question not necessary to the decision of this motion. It is enough that they are not entitled to what is asked for in the writ. To hold otherwise, would be to sanction the principle that any contractor with the city government might, before his contract is completed, insist that the amount contemplated to be expended under his contract should be raised by tax, because it was possible he might require it during the coming year.

If any one has a right to such a writ it must be the commissioners who have entered into the contract, and who will require the moneys for payment.

It may be said that a part of this sum is now due to the relators. That, however, does not relieve the difficulty. If the writ demands too much, there must be judgment for the respondents. The peremptory writ must follow the alternative mandamus, and there cannot be judgment for the relators for part, and for the respondents for the other part. (*People agt. Supervisors of Dutchess*, 1 Hill, 50.) In the case from 4 Barn. & Cresw. 895, no objection appears to have been made on this point.

For these reasons, I am of the opinion that the motion for a peremptory mandamus should be denied, and that although the return is defective, still there is no necessity to strike out any part of it, as no further relief could be given to the relators on this application.

As the return is defective, I think it proper to refuse costs to either party on this motion.

Motion denied without costs.

SUPREME COURT.

WILLIAM H. OWEN agt. EDGAR M. MASON.

Where the defendant, on the call of the cause at the circuit, stated that the case was amicably settled between the parties, which was assented to by an attorney for the plaintiff *not of record*; but the attorney of record of the plaintiff objected, and produced a *notice of lien for costs*, served upon the defendant and forbidding a settlement, except with the attorney of record for the plaintiff, and the case was adjourned to enable the defendant to make such motion as he might be advised for discontinuing the action,

Held, where the defendant's motion, to discontinue the action on the ground of settlement, was subsequently denied, and he omitted, under leave then given, to move for leave to file a supplemental answer setting up the facts of the settlement, that, at a subsequent circuit, the plaintiff was regular in taking an inquest in the cause.

New-York Special Term, November, 1859.

MOTION to set aside inquest, for irregularity.

WM. W. BADGER, *attorney of record for plaintiff.*

GEORGE TERWILLIGER, *attorney for defendant.*

MULLIN, Justice. Defendant moved in the above entitled action to vacate an inquest taken therein, by the plaintiff's attorney, upon the following facts:

The action was reached at the special circuit in October, before Justice ROOSEVELT, and moved for trial by the plaintiff's attorney, when the plaintiff appeared by another attorney, not of record in the case, and stated to the court that the action had been settled by the parties thereto, to their mutual satisfaction, to which the defendant's attorney, also appearing, assented, and moved to dismiss the complaint.

The attorney of record for the plaintiff objected, produced a notice of lien served upon the defendant, forbidding a settlement except with him as such attorney of record, and moved for a judgment against the defendant for the amount of his

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taxable costs, to be adjusted by the clerk, on the ground that the settlement, being made without his consent, and in fraud of his rights, was void as to him, or amounted at most to a confession of judgment which entitled him to costs.

His honor declined to rule on the motions, but adjourned the case, and ordered the defendant to move at chambers, as he might be advised, to dispose of the case.

Defendant then moved at chambers before his honor Judge INGRAHAM, for an order discontinuing the case, on the grounds above mentioned.

The judge, on the 13th of October, denied the motion without costs, and intimated that the only motion the defendant could make was for leave to file a supplemental answer, setting up the facts of the settlement, and that the court would only allow such answer to be filed for such a purpose on payment of all costs of the plaintiff's attorney up to that time.

Defendant had leave to make such a motion, but never made it. When the cause was again reached at the circuit, the plaintiff's attorney of record took an inquest, the defendant's attorney being in court, but not appearing; and afterwards perfected judgment and issued execution thereon for \$77, the amount of his costs.

Defendant now moved to vacate said inquest and execution, for irregularity, on the ground that the case had been settled as aforesaid, and that the inquest was taken by the plaintiff's attorney, after an order from the plaintiff, forbidding him to go on with the case, and, therefore, without authority.

The inquest and execution are regular, and the motion must be denied with \$10 costs.

SUPREME COURT.

GOULD & PALMER agt. JACOBSON and others.

Where the only ground on which an *injunction* can be sustained is *denied* by the defendants in their answers, it cannot be retained. -

New-York Special Term, November, 1859.

MOTION to continue injunction.

INGRAHAM, Justice. The plaintiffs' complaint only shows the ordinary statement of notes made without consideration, and passed without any present consideration, to secure an old indebtedness. Under ordinary circumstances, the plaintiffs would not be entitled to an injunction, and in any case only to prevent the holder from negotiating the same before they became due.

In the answers of the defendants, the equity, on which the plaintiffs seek the injunction, is denied by the defendants—the one defendant denying the averments as to the agreement on which the notes were delivered, and the other defendant averring that, on receiving the notes, they released the surety of their former indebtedness. If French was so discharged, that formed a good consideration for the notes, and made them valid securities in the hands of Duncan, Sherman & Co., and if the contract upon which the notes were delivered to Jacobsohn is correctly stated in his answer, even then, they have answered the purpose for which they were made, and the same can be recovered in the hands of Duncan, Sherman & Co.

It is enough, however, to dispose of this motion, to say, that the only ground on which the injunction could be sustained is denied by the defendants in their answers, and where that is the case the injunction cannot be retained.

According to the complaint, the notes were dated the 7th of

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June, payable in four and five months. If so, they are both due, and after they are due, if passed by the holders, the party taking them must do so subject to all equities existing at the time. Whatever defence, therefore, the plaintiffs may have to the notes in the hands of Duncan, Sherman & Co., would be good against subsequent holders of the notes, if passed away after maturity.

The motion to continue the injunction is denied, and the temporary order dissolved. Costs to abide the event.

SUPREME COURT.

GEORGE W. STAKE agt. CHARLES ANDRE and others.

There is no authority in the Revised Statutes or the Code, for a *commission* to examine a party to an action, for the purpose of procuring his testimony to be used on a *special motion*. All the provisions of the statutes, in reference to the examination of parties, relate to evidence to be used on the *trial* or *hearing*, and not to proof on interlocutory motions.

New-York Special Term, November, 1859.

MOTION to set aside an order, and commission granted under it.

F. L. STALLKNECHT and THOS. C. T. BUCKLEY, *for the motion.*

D. DUDLEY FIELD and RICE & HILL, *opposed.*

T. R. STRONG, Justice. The plaintiff, having a judgment against the defendants, has given notice of a motion to set aside a prior judgment against the defendants in favor of another person, and the court, upon an *ex parte* application of the plaintiff in the prior judgment, founded upon an affidavit, has granted an order for a commission to take the testimony

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of the moving party in the motion, to be used on the hearing, under which a commission has been issued. It is now asked that the order and commission be set aside as unauthorized.

The Revised Statutes of 1830 (*Vol. 2, p. 554, §§ 24, 25*) contain provisions for compelling a witness, who refuses to make an affidavit, of facts known to him, material in a motion or other proceeding in this court, for the purpose thereof, to give testimony before a commissioner appointed by the court, to be used on the motion or other proceeding; but I am satisfied they do not warrant the order in question. At the time the provisions became a law, neither party to an action could be examined as a witness, and there is nothing in the statute manifesting an intention to change the law in that respect.

Besides, parties are usually designated by that term, and the word witness ordinarily imports a person not a party.

If the legislature had intended to compel a party to an action to be examined, their intention would, doubtless, have been expressed so clearly as to admit of no mistake.

In 1847, page 630 of the laws of that year, a law was passed for the examination of parties, in civil suits and proceedings, as witnesses, but the language used clearly shows that the law relates to evidence to be used on the trial or hearing, and not to proofs on interlocutory motions.

The examination was to be at the trial or hearing of the suit or proceeding.

The Code subsequently passed provides that no examination of a party shall be had on behalf of the adverse party, except in the manner therein prescribed (§ 389).

All the other provisions on the subject refer only to evidence upon the issues formed in actions. There is not only no provision in the Code, whereby a party to an action can be compelled to testify, on a special motion therein; but such compulsory examination appears to be within the spirit, at least of the prohibition mentioned. (*See Henlin agt. Reeder, 6 Abbott, 19; Keeler agt. Dusenberry, 1 Duer, 660.*)

And if the Revised Statutes, or the act of 1847, were in

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conflict with that prohibition to any extent, they would, thus far, be repealed by it. (See *Bacon agt. Magee*, 7 Cowen, 515, and note to that case.)

I know of no other ground on which the order in question can stand, and, if the views stated are correct, it follows that the motion must be granted.

Ordered accordingly, with \$10 costs.

SUPREME COURT.

ABRAM W. TOLL, assignee, &c., agt. HENRY S. WHITNEY.

SAME agt. McCORMICK.

SAME agt. KEELER.

In *mutual insurance companies*, organized under the act of 1849 (*Laws of 1849*, p. 441), there were "premium notes," different and distinct from *capital stock notes*. And the premium notes were of a different tenor from the stock notes drawn according to the law (5th section); and controlled by different rules as to calls and collection.

On these *premium notes*, given after the organization of the company, and in the course of their regular business, no action can be maintained, except it be to pay for losses or expenses actually accrued while such notes were in force, and after assessments made; they come within the decision of *Devendorf agt. Boardley* (23 Barb. 656).

Albany General Term, September, 1858.

Present, WRIGHT, GOULD and HOGEBOOM, Justices.

By the court—GOULD, Justice. These three cases turn on substantially the same ground of defence; they were argued together, and one opinion can give the decision in all.

It is first desirable to free the cases of a claim on the part of the plaintiff, which seems to make them differ from cases heretofore decided in this court. This claim is, that the Insurance

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Company, of which the plaintiff is assignee, was organized under the law of 1849, and not that of 1853; and that, therefore, a rule applies to the *premium* notes, different from the rule laid down in *Devendorf* agt. *Beardsley* (23 Barb.), and subsequently in this district, in *Devendorf* agt. *Cornell*. And that, by this different rule, *all premium* notes are (by the law of 1849) a part of the *capital* of companies organized under that act.

This I deem a mistake. The act of 1849 (*Laws of 1849*, p. 442, § 5) does not call the notes "premium notes," but "notes received in advance for premiums," &c.; and such notes, when given *under that section*, are to be "considered as part of the capital stock;" and these are negotiable and payable absolutely and in full, without assessment or any of the provisions applicable to notes given *after* the organization, and in the course of the regular business of the company. That act, however (page 445, § 10), authorizes such corporations, after organization, and, indeed, requires them to declare, in their filed charter, "the mode and manner" of doing business *as such organized company*. And the charter of the company in the cases before us, in its 11th section (*Case*, folio 25), provides for taking "*premium notes*," which certainly cannot be a part of the capital stock. So that, under the law of 1849, there was such a thing as a "premium note," different and distinct from a *capital stock note*; and the premium notes were of a different tenor from a stock note drawn according to the law, and controlled by different rules as to calls and collection.

Taking these positions to be correct, the case of *White* agt. *Haight* (16 N. Y. Rep. 310) by no means conflicts with the other decisions I have alluded to. At p. 314 of that case, it is admitted that the note there sued (called, indeed, a "premium note,") "*formed part of the original capital*." So that it was, of course, under the 5th section above referred to; and though, on its face not of the tenor required by the act, it was (and such was the decision of that case), *payable as by that section*; the law controlling the intent of the parties, and making that

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intent accord with the law. And the whole of that decision is, that such a note—one given as part of the capital stock—is a *stock note*, and payable as such, no matter what its tenor.

In the cases before us, however, there is neither admission nor proof that either of the notes was a part of the original stock. Nor does the referee find either of them to be so.

The plaintiff claims, indeed, that the points on which the *Devendorf* cases were decided were not taken before the referee. But, allowing (what is by no means certain) that the 4th ground on which a non-suit was asked, "that the complaint does not state facts sufficient to constitute a cause of action," is not aptly taken, as taken for the want not of *proofs* but of *allegations*, or as being too indefinite; allowing this not to be well taken, the second ground for asking the non-suit, "the defendant is liable only to his proportion," &c., is plainly consistent with no other line of defence, than that the note was not a stock note, and so liable merely to assessment, &c.

I should hold these notes to be, according to their tenor (in the absence of proof to the contrary), premium notes, and not stock notes; and thus fully within the decisions in the *Devendorf* cases. Of course, the judgments should be set aside, and a new trial be had.

SUPREME COURT.

LOFTUS WOOD agt. EDMUND KIMBALL.

No *ex parte* order to *stay proceedings* on appeal, beyond twenty days, can be made by a judge at *chambers*. And this is applicable to the *first judicial district*, where the same judge, at the same time, may be sitting at special term and at chambers.

New-York Special Term, October, 1859.

INGRAHAM, Justice, Motion is made to set aside an order staying proceedings upon a referee's report, and judgment

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thereon, until the decision of an appeal thereon, taken to the general term—because the same is for a longer time than twenty days, and was made without notice.

By section 401 it is provided, that no order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except on previous notice.

Judge HARRIS, in 8 *Howard*, 49, has held that this section is applicable to such an order as the present.

In *Lattimer agt. Lord* (4 *E. D. Smith*, 184), the general term of the common pleas, Judge WOODRUFF delivering the opinion, fully examined this question, and he came to the conclusion that the section did apply to orders staying proceedings on appeal, although the case was decided on other grounds.

I understand that orders have heretofore been made in this district similar to the present; and it seems idle to say that the same judge, sitting at the same time in special term and chambers, may make an order valid if he states it to be made in court, and that it is void if made by him in chambers. Yet such is the distinction made in the Code, and sustained by these decisions.

As no harm can come to the parties from requiring them either to have the order made by the judge at special term, or, if he is not holding court, on notice to the other party, I see no great evil in following these decisions, and requiring the party to obtain a new order, either on notice or from the judge in court.

The motion is granted, but the proceedings stayed to allow the defendant to renew his application for a stay until the decision of the appeal. Such stay to be for ten days. Costs to abide event.

Knapp, &c., agt. Dagg.

SUPREME COURT.

ESTHER A. KNAPP, an infant, by her guardian, WILLIAM MURRAY, JR., agt. WALTER DAGG.

Where the plaintiff sustained injuries from the collision of the carriage, in which she was riding as a passenger, with the defendant's carriage, and the carelessness and negligence by which the collision occurred were equally the fault of the driver of each team,—*Held*, that the plaintiff was not chargeable with the negligence of the driver of the team after which she rode, and she could recover against the defendant for her injuries.

Delaware Circuit, September, 1857.

THE evidence in this case showed that the plaintiff was riding as a passenger, in her brother's wagon, on a highway in Delaware county, where they were met by the defendant, who was driving two horses and a wagon. A collision occurred between the two wagons, that turned over the one in which the plaintiff was riding, threw her out upon the ground, and injured her. The negligence of the driver of each team concurred to produce the collision; but the plaintiff was in no way to blame, unless it was for riding with a careless driver.

The defendant's counsel moved for a non-suit, on the ground that the negligence of the driver of the team after which the plaintiff was riding concurred to produce the collision by which the plaintiff was injured, and that the plaintiff was responsible for his negligence, so far as this action was concerned.

WILLIAM MURRAY, JR., *for plaintiff.*

GORDON & YEOMANS, *for defendant.*

BALCOM, Justice, said: The plaintiff is not chargeable with the negligence of the driver of the team after which she rode. She could have sued him for the injury she has sustained. The defendant is guilty of injuring her as well as he is.

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They have severally wronged her. She might sue either. She has chosen to bring her action against the defendant. The motion for a non-suit must be denied.

The plaintiff had a verdict for \$50 damages.

UNITED STATES CIRCUIT COURT.

WILLIAM NELSON and others agt. JOHN O. WOODRUFF.

JOHN O. WOODRUFF agt. WILLIAM NELSON and others.

The effect on a cargo of *lard*, shipped in very hot weather, is the melting of the lard, and when melted to shrink the staves and loosen the hoops of the casks and barrels containing it. In such case, the *shipper* takes the risk, and, unless one neglect or fault can be charged upon the vessel contributing to the loss, he is liable.

New-York, October, 1859.

NELSON, C. J. The libel was filed in the first case by the libelant to recover freight upon a shipment of 1099 barrels and 61 tierces of lard, in the ship "Maid of Orleans," from New-Orleans to this port, in July and August, 1854. It was filed in the second case by the consignee against the respondent, to recover damages for a loss of part of the lard in the course of the shipment. Both cases depend upon the same evidence, and were heard together in the court below, and in this court. It is not denied but that a very heavy loss of the lard occurred on board of the vessel during the voyage, which was discovered upon discharging the cargo at this port, a loss of about six thousand pounds, worth some \$600. The bills of lading are in the usual form, shipped in good order, &c., damages of sea, &c., except to each is added at the foot, "contents unknown." The weather was excessively hot in New-Orleans in the month of July, 1854, when the lard was put on board

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and delivered by the shipper on the levee, which was done morning and evening to avoid the heat of the day. The delivery, however, was continued in the morning until 10 o'clock and renewed between 3 and 4 P. M. And, according to the weight of the testimony, the lard was taken on board the vessel with all reasonable dispatch. When taken on board it was in a liquid state, and a few barrels leaked so badly at the levee, that the hoops had to be tightened, and some of the barrels were found to be partially empty.

The great deficiency in the quantity that occurred in the shipment is attributable to the leakage of the casks, which the libelant insists is chargeable alone to the condition and character of the article, and to the excessive hot weather at the time of the shipment or during the voyage. The proofs in the case, taken at New-Orleans and at this port, are very full and satisfactory that the lard was properly and skilfully stored, both in respect to the place in the hold of the vessel, and the manner of the storage. And it is further shown, that all due and proper care was taken in the course of the shipment, and I perceive nothing in the evidence, when critically examined and weighed, in the appearance or condition of the packages when discharged at this port, going to impair the proof of the libelant, on this head. The barrels and tierces appear to have been well made and with proper material, and to have withstood the shipment without any substantial injury, with the exception that the seams were opened, and hence the leakage. But this is accounted for by nearly all the witnesses experienced in the shipment of the article, as resulting from the effect of the hot weather, in connection with the tendency of the melted lard to shrink the staves and loosen the hoops. The proof is, that the months of July and August were hot beyond those of preceding years; and that, on opening the hatches of the vessel at this port, the heat in the hold was so excessive that no person could remain in it.

It is well settled that the shipper takes a risk attendant upon a shipment of cargo of this character from the heat of the weather, unless one neglect or fault can be charged upon the

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vessel contributing to the loss (12 *How.* 272), and I must say, after a very careful examination of the evidence, in my judgment no such negligence or fault has been established.

The decree of the court below must be affirmed.

SUPERIOR COURT.

VENCE agt. SPEIR.

SAME agt. SAME.

Witnesses, who attend the trial by request (without subpoena), in two causes, are entitled to the full allowance of fees in each case, though the parties may be the same.

New-York Special Term, December, 1859.

SLOSSON, Justice. Witnesses, who come from a distance at the request of parties, without subpoena, are entitled to the allowance for travelling expenses, and to the per-diem allowance provided by statute; but the per-diem allowance is to be restricted to the days during which the case is actually on the day calendar of the court sitting for trials, and actually in session, and the witnesses are in attendance. If they attend on the like request in two causes, they are entitled to the full allowance in each case, though the parties may be same. (19 *Wendell*, 82; 12 *How.* 446; 4 *Sand.* 719; 16 *How.* 306; 2 *R. S.*, 5th ed., 922, § 24.)

Referred back to the clerk for retaxation.

NEW-YORK COMMON PLEAS.

WILLIAM WALLACE agt. THE MAYOR, ALDERMEN, AND
COMMONALTY OF THE CITY OF NEW-YORK.

A *plaintiff* may be examined as a witness in his own behalf (*Code*, § 399) in an action against a *municipal corporation*.

If the corporation of the city of New-York suffer, as in this case, a part of the public highway to remain out of repair, in so exposed and dangerous a state that a passenger, without any negligence on his part, drops at night into a pit-fall in the sidewalk, and is injured, it must answer to the injured party for the damages occasioned by its negligence.

The liability of the corporation for the neglect of its duty, to keep the streets in repair, which is imposed upon it by statute, is distinguishable from cases where the streets are obstructed by the acts of others.

Where the evidence does not show that the act causing the injury has been *wilfully* done, or the circumstances such as to show a deliberate and positive intention to injure, or a reckless disregard of the safety of persons or property, the jury should not be instructed that they may give vindictive or punitive damages; but charged that the plaintiff can recover only such damages as are the legitimate and direct result of the accident.

New-York General Term, November, 1859.

MOTION for a new trial.

F. H. B. BRYAN, *for respondent*.

A. R. LAWRENCE, JR., *for appellants, argued the following points:*

First. The plaintiff should have been excluded from testifying upon the objection raised by the defendants' counsel.

a. The 399th section of the Code, as amended, was clearly intended to admit the testimony of one party to a suit, only when the adverse party is living, and capable of testifying in his own behalf.

b. The defendants are not, within the meaning of the section, a *living party*.

They are an artificial body, created for certain political and governmental purposes, and none of their officers or employees

have the direct or immediate interest in the event of this suit which the plaintiff has, or the interest which both parties ordinarily have in the result of a litigation.

c. The effect of admitting the testimony of the plaintiff in this case is to enable a party to put his own coloring upon the case, while the other party is, from the nature of things, excluded from rebutting that testimony.

The intention of the legislature was to give each party an equal chance for placing the court in possession of the facts relied upon by him for complaint or defence, not to give to one party an advantage over the other in that respect.

Second. The motion of the defendants' counsel for a dismissal of the complaint should have been granted.

a. The ordinances of the defendants impose upon the "owners, occupants, or lessees of the lots fronting upon the streets of the city, the duty of paving and keeping in repair the sidewalks in front of their lots."

b. The defendants were authorized by their charters to pass such an ordinance, and it was a proper exercise of their governmental power. (*Charter of Montgomerie*, § 14, *Kent's ed.*, 1854, p. 94.)

c. The case, therefore, presents merely a violation of an ordinance of the defendants by the parties owning or occupying the lots fronting upon the side-walk in question; and for the injuries sustained by individuals from such a violation, it is well settled that the defendants are not liable. (*Levy agt. Mayor*, 1 *Sand.* 465; *Griffin agt. Mayor*, 5 *Seld.* 456; *Same case*, opinion SANDFORD, J.)

Third. The principle established in the case of *Hutson agt. The Mayor* is not applicable to this case, because—

1st. There is no legal evidence showing that the place at which the plaintiff was injured was ever laid out or opened as a public street, or that the defendants had control thereof. It is alleged in the complaint that the hole in question was in a street, and the allegation is denied by the answer.

And it was incumbent upon the plaintiff to show the fact as the foundation of his action. (*Code*, § 168.)

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2d. It does not appear that the hole in question was caused by a neglect of the defendants to repair the side-walk.

3d. In *Hutson's* case, the injuries of which the plaintiff complained were occasioned by a neglect of the defendants to repair the carriage-way of the street, which had been out of order for a long time; and it did not appear that there was any ordinance of the defendants imposing the duty of making such repairs upon private individuals. (5 *Seld.* 163.)

4th. The evidence in *Hutson's* case showed that the excavation into which the plaintiff fell had been in existence for such a length of time as would justify the court in presuming that the corporation had notice of its existence.

In this case, no notice of the existence of the hole into which plaintiff fell was brought home to defendants.

Fourth. The learned judge erred in refusing to charge, that notice to the defendants of the existence of the hole, and the lapse of a reasonable time between such notice and the accident to allow the defendants to repair the same, must be shown, to entitle the plaintiff to recover.

a. The charters of the defendants only allow them to have work performed when the expense exceeds a certain amount (\$250), by contract, made after an advertisement for ten days, &c.

If the plaintiff can recover without proof of notice and neglect to repair, then, while the charter of 1853 prohibits expenditures beyond \$250, without the advertisement aforesaid, the law would render the defendants liable for not doing an illegal act.

b. Besides, the ordinances of the defendants only authorize the street commissioner to order the side-walks to be paved or repaired after *complaints* have been made to him that the same are out of repair, and after he has notified the owners, &c., of the lots, &c., to pave or repair the same, and they have neglected so to do.

There can be no dispute about the power of the defendants to pass the ordinance. (*Montgomerie Charter*, § 14.)

The defendants are not bound to see, at their peril, that all

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their ordinances are enforced. (*Levy* agt. *Mayor*, 1 *Sand.* 465; *Griffin* agt. *Mayor*, 5 *Seld.* 456.)

And until complaints are made, or notice given to the street commissioner, there is no neglect of duty on the part of the defendants, for which they are liable to respond in damages.

Fifth. For the reasons stated in the third point, the learned judge erred in refusing to charge as requested in the 5th and 7th propositions of defendants' counsel.

Sixth. The learned judge erred in refusing to charge as requested, that "if the plaintiff is entitled to recover at all, he is only entitled to recover for the damages which he sustained as a legitimate and direct result of the accident," and that "the plaintiff is not entitled to recover punitive or vindictive damages," as in the 8th and 9th propositions of defendants' counsel.

a. There is no malice or moral wrong shown on the part of the defendants.

b. In such cases, the jury cannot give anything beyond compensation for the actual loss sustained by the injured party. (*Sedgwick on Damages*, 82; *Clark* agt. *Brown*, 18 *Wend.* 213, 229; *Butler* agt. *Kent*, 19 *John.* 228.)

Seventh. The damages to which the plaintiff is entitled (if entitled to recover at all), being confined strictly to actual compensation for the loss which he sustained by the injury, and there being no evidence as to the amount which he expended for his cure, nor any evidence by which the jury could measure such expense, the defendants were entitled to have the jury instructed as requested in the 10th proposition.

Eighth. The judgment at the special term should be reversed, and a new trial ordered.

By the court—DALY, J. The first question in this case is, whether the plaintiff could be examined as a witness in his own behalf in an action against the corporation of the city of New-York. By the 399th section, the examination of a party as a witness on his own behalf is conditional. It can be had

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where the adverse party or person in interest is living, unless the opposite party is the assignee, administrator, executor, or legal representative of a deceased person. It is objected that the defendants here are not, within the meaning of this section, a living party, but an artificial body, created for certain political and governmental purposes; and that the effect of admitting the testimony of the plaintiff in this case is, to enable a party to put his own coloring upon the case, while the other party is, from the nature of things, excluded from rebutting that testimony. That the intention of the legislature was to give each party an equal chance for placing the court in possession of the facts relied upon by him, for complaint and defence, not to give one party an advantage over the other in that respect.

The defendants may, in my judgment, be regarded as a living party within the meaning of this section. The chief distinguishing attribute of a corporation is, its power of continuous duration, unaffected by the death, incapacity or change of its members. As Lord COKE expresses it, "it is not subject to imbecilities or death of the natural body; for a corporation aggregate of many is invisible, immortal." (*Case of Sutton's Hospital*, 10 Coke R. 326.) It is calculated for, and capable of duration for ever, where no limitation is fixed by the act that creates it, though it may be brought to a termination by accident or by certain defaults of duty on the part of its members at any period; but, however long its duration, the corporation always continues the same; and the same rights, privileges, duties and liabilities, attach to it, as it had at the first moment of its creation, precisely as though it was an individual. (*Grant on Corporations*, 3.)

It is so far considered to have a personality of its own, that the word person in statutes has often been construed to include corporations. (*The Dean and Chapter of Bristol* agt. *Clark*, 1 Dyer, 83 b; 2 Coke Inst. 722; *Cortis* agt. *Kent Waterworks Co.*, 7 B. & C. 314; *Boyd* agt. *Croydon Railway Co.*, 4 Bing. N. C. 660; *Attorney-General* agt. *Newcastle*, 5 Beavan, 307; 1 *Reeves' History of the English Law*, 76, 79.) It may sue or be sued; and

as it has this unbroken personality and power of perpetual succession, it may, without any violation of language, be referred to, and embraced in a statutory designation of a living party. Nor will this construction have the effect of allowing one party to give testimony whilst the other is necessarily excluded from rebutting, or defeat the intentions of the legislature, by not giving each party an equal chance of testifying.

The parties, defendants to this action, the mayor, aldermen and commonalty of the city of New-York, by their corporate name or title, are and always were, together with their officers and agents, competent witnesses in an action, in which the rights or liabilities of the corporation are in controversy. (*Van Wormer agt. The Mayor, Aldermen and Commonalty of the city of Albany*, 15 Wend. 262; *Watertown agt. Cowen*, 4 Paige, 510; *ex parte Kip*, 1 id. 613; *Falls agt. Bellknapp*, 1 Johns. 486; *Corwin agt. Haines*, 11 id. 76; *Bloodgood agt. Jamieson*, 12 id. 285; *Code*, § 398.) And this applies not merely to the members of municipal, but also to private corporations, the members or stockholders of which were formerly inadmissible as witnesses by reason of their interest, a disqualification which no longer exists. The defendants, therefore, in this action, could avail themselves of every right that any other defendant could have, and even more, as they could all be examined as witnesses, whether the plaintiff offers himself as a witness or not.

The corporation are bound to keep the streets and avenues of the city in such repair that they may be safely traveled when they are opened for public use, and if they negligently suffer them to get out of repair, they are liable for any injuries that may happen to persons through such negligence. (*Hutson agt. The Mayor, &c., of New-York*, 5 Seld. 163; *The Mayor, &c., of the city of New-York agt. Furze*, 3 Hill, 612; *The Rochester White Lead Company agt. The City of Rochester*, 3 Comt. 464.) The evidence was sufficient to warrant the jury in finding that the plaintiff was walking, at the time of the accident, through an avenue open for public use. He was walking up the 11th avenue at ten o'clock at night, when, at the

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corner of 31st street, he pitched forward into a hole in the side-walk, ten feet wide, seven feet across and five feet deep, and was severely injured. The corporation have provided by ordinance that the side-walks shall be paved and kept in good repair by the owners, lessees or occupants of the houses or lots fronting on any street or avenue, under a certain penalty, and if they neglect to do so, it is to be done by the corporation at the expense of the owners, lessees or occupants, in the manner provided by the ordinance. Upon complaint made to the street commissioner, he is to notify the owners, &c., and if they do not repair it within a certain time, he is to have it done, if the expense does not exceed \$250, and if it exceeds that sum, it is to be done by contract, in the manner provided by ordinance. The side-walk is a part of the public street, designed for the use of those who travel on foot, and though the corporation may impose upon the owners of lots, fronting upon the streets or avenues, the burden of paving and keeping the side-walks in repair, they do not thereby relieve themselves of the duty imposed upon them by charter and by statute of "altering, amending," and keeping in repair the streets and highways within the city. (*Kent's Charter*, 15, 99, 235, 237; *Laws of 1813*, chapter 86; 2 *Rev. Laws*, 407, § 175; *Wilson agt. The Mayor, &c., of New-York*, 1 *Denio*, 601.)

And if they suffer, as in this instance, a part of the public highway to remain out of repair, in so exposed and dangerous a state that a passenger, without any negligence on his part, drops at night into a pitfall in the side-walk, and is injured, they must answer to the injured party for the damages occasioned by their negligence. Their liability for the neglect of a duty like this, to keep the public streets in repair, which is imposed upon them by statute, is distinguishable from cases where the streets are obstructed by the acts of others, as in *Griffin agt. The Mayor, &c., of New-York* (5 *Seld.* 457); or where parties erecting buildings suffered piles of rubbish to incumber the street, which led to the accident, for which the corporation were sought to be made liable, as *Levy agt. The Mayor, &c.* (1 *Sandf. S. C. R.* 465), in which they were sought

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to be made liable for an accident caused by swine running at large in the street, in which cases they could not be held liable for negligence, until they were notified or advised of the obstruction, and had neglected to cause it to be removed.

I think, however, that the instruction to the jury, that they might give exemplary damages if they thought that the corporation was guilty of gross negligence in suffering the hole to remain in the condition it was, was erroneous, and that the defendant was entitled to have the jury instructed as he requested; that the plaintiff could recover only for such damages as were the legitimate and direct result of the accident, and that he was not entitled to recover punitive or vindictive damages. For all that appeared in the evidence, the hole in the side-walk may have been the work or act of a private individual, in no connection with the corporation, and there was nothing in the evidence to show that the corporate authorities were notified of it, or had any knowledge of its existence. The recovery of punitive or vindictive damages is allowed only where the act causing the injury has been wilfully done; where the circumstances show that there was a deliberate, preconceived, or positive intention to injure, or that reckless disregard of the safety of person or property which is equally culpable.

The evidence in this case would not warrant the jury in forming any such conclusion as respects the corporation. It may be doubted if the instruction had any injurious effect, as the damages found by the jury were very moderate under the circumstances. Still, we cannot say that it had not, and will, therefore, though reluctantly, be compelled to order a new trial.

SUPREME COURT.

JOHN GILLILAND agt. ALANSON P. CAMPBELL.

Where an action was brought upon a promissory note for \$186, given on the settlement of accounts between the parties, and a defence interposed on the ground of a mistake in fact as to any amount being due to the plaintiff, and the referee, on the trial, examined all the accounts between the parties, which exceeded \$2,000, and corrected the errors committed in their settlement, which reduced the amount of the note down to \$26.12, and thereupon reported his conclusions of fact, and added thereto his conclusion of law, "that the plaintiff recover of the defendant \$26.12, with costs,"

Held, 1. That by the facts found a justice of the peace had no jurisdiction of the action, and,

2. That the referee's conclusion of law, that the plaintiff recover costs, as well as damages, was correct.

Broome Special Term, April, 1859.

THIS action was tried before a referee, who reported his conclusions of fact; and added thereto his conclusion of law, "that the plaintiff recover of the defendant \$26.12, with costs." The plaintiff had his costs adjusted by the clerk, and then entered a judgment upon the report against the defendant for \$26.12 damages, and \$80.12 costs. The defendant made a motion to set aside the judgment for costs against him, and asked for an order that he have judgment for costs against the plaintiff.

The action was founded on a promissory note, for the payment of \$186. The defence was, that the note was given on a settlement of accounts between the parties, in which a mistake of fact was made, which, if corrected, would show that the defendant did not owe the plaintiff anything; but that the latter owed the former \$100. The total amount of the accounts settled exceeded \$2,000. And they were all examined by the referee on the trial, and when he made his report, he corrected the errors that were committed in the settlement, made by the parties, which reduced the amount due the plaintiff, from that specified in the note, down to \$26.12.

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The accounts settled were partnership accounts; and the referee found how much money each partner had paid out for the firm, and how much each had received for the firm; and calculated the profits and losses in the firm business, and came to the conclusion that a mistake of fact was made in the settlement, and that the defendant, instead of owing the plaintiff the \$186 mentioned in the note, only owed him \$26.12.

L. L. BUNDY, *for plaintiff.*

E. E. FERRY, *for defendant.*

BALCOM, Justice. I am of opinion the facts show that this was an action, of which, according to section 54 of the Code, a court of a justice of the peace had no jurisdiction; and that, therefore, the plaintiff was entitled to recover costs of the defendant. (*Code*, § 304, *subdivision* 3.) The settlement made by the parties of their accounts was found to be erroneous; and for that reason the accounts were not liquidated by the settlement, but were unliquidated so far as the trial was concerned. And as they exceeded \$400, and must have been proved to exceed that sum, to the satisfaction of a justice of the peace, if the action had been brought in a justice's court, such a court had no jurisdiction of the action. (*Code*, § 54, *subdivision* 4.) The action was necessarily brought in this court; and as I have before stated, the plaintiff was entitled to costs, although he recovered less than \$50 damages. (*See Code*, § 304; *Crim agt. Cronkhite*, 15 *How. Pr. Rep.* 250.)

The facts found by the referee show that a justice of the peace had not jurisdiction of the action. Hence the referee's conclusion of law, that the plaintiff recover costs as well as damages, was correct. The report of the referee stands as the decision of the court, and judgment was rightfully entered thereon, in the same manner as if the action had been tried by the court. (*Code*, § 272.) The clerk or the plaintiff's attorney made up the judgment-roll, by including the report therein, in the same manner that he would have included the

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decision of the judge, if the action had been tried by the court. (*Code*, § 281.)

I can see no good reason why the referee should not find the facts, that determine which party is entitled to costs, in actions arising on contract, where he decides that the plaintiff shall not recover \$50, and also the legal conclusion as to who shall recover costs, and I think it his duty to do so. It has been held, where costs rest in the discretion of the court, and the action is referred, that the referee should determine the question of costs. (4 *How. Pr. Rep.* 300; *id.* 356; 10 *Barb.* 448.) But where the right to costs may be affected by facts not proved on the trial, he has no right to decide that question. (12 *How. Pr. Rep.* 300.)

In cases like the one under consideration, the facts that show which party is entitled to costs, when the plaintiff recovers less than \$50 damages, are proved or admitted on the trial; and for this reason I am of the opinion the referee very properly passed upon the question as to which party should recover costs in this action. The motion to set aside the plaintiff's judgment for costs, and for an order that the defendant recover costs, should be denied, with \$10 costs.

NOTE.—Affirmed with \$10 costs, at the Tompkins General Term, Nov., 1859.

SUPREME COURT.

THE PEOPLE, &c., on the complaint of JOB ROBERTS, agt.
FRANCES STANLEY and SARAH STEWART.

Upon application by *habeas corpus* and *certiorari* for the discharge of a defendant from arrest, the court must determine the case *upon the testimony taken before the committing magistrate*, and if, upon *that testimony*, there is want of probable cause, it is the duty of the court to discharge the defendant. (*This seems to be adverse to the views expressed in People agt. Richardson, ante, p. 92.*)

New-York, Special Term, December, 1859.

HEARING on return to *habeas corpus* and *certiorari*.

The People, &c., agt. Stanley and Stewart.

CHARLES S. SPENCER, *for petitioners.*MR. SEDGWICK *for the people.*

JAMES, Justice. This was an application for the discharge of Stanley and Stewart, upon *habeas corpus* and *certiorari*. The returns to the writs show that these prisoners were committed on a charge of grand larceny, by Justice Welsh, on the 29th of November last. The testimony on the examination was, that on that day the two prisoners were in the store of Roberts, 505 Canal-street; that they were seen standing together by one of the counters where black silks were sold; that afterwards Miss Stanley moved to another counter, about 15 feet distant, where plain silks were sold, leaving Mrs. Stewart at the first counter, pricing goods of a clerk; that Miss Stanley, while at the counter of plain silks, was observed to lean over the silks in a manner that excited suspicion, and an officer was sent for; that, before the officer's arrival, Miss Stanley passed towards the front of the store, and finally out into the street; that Mrs. Stewart at the same time passed to the rear of the store to look at goods with the clerk who was waiting upon her; that a police officer arrived about this time, arrested Miss Stanley, and also Mrs. Stewart. On searching their persons, three pieces of silk were found secreted under the clothing of Miss Stanley, which Roberts recognized as having been stolen from him. Nothing was found upon Mrs. Stewart. Upon this evidence both prisoners were committed for want of bail of \$1,000 each.

It is clear, so far as Miss Stanley is concerned, that the commitment was right, and fully warranted by the testimony, and the motion for her discharge must be denied, and she remanded to prison.

Upon this application, the court must determine the case upon the testimony taken before the committing magistrate, and if, upon that testimony, there is want of probable cause, it is the duty of this court to discharge the prisoner.

In Mrs. Stewart's case there is an entire want of testimony to connect her in any way with the larceny, or to show any

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complicity, or even an acquaintance with the other prisoner. It does not appear that they entered the store together, or that they even spoke together, or recognized each other as acquaintances. It may be that the prisoners were accomplices; but, if so, the proof entirely failed to show it. For aught that appeared from the proof, the prisoner Stewart may have been wholly and entirely ignorant of the character and acts of the other.

In my judgment, there was no sufficient ground shown for her arrest and detention, and therefore she must be discharged.

Let an order be entered in accordance with these views.

NEW-YORK COMMON PLEAS.

THE FIRE DEPARTMENT agt. JOSEPH HARRISON.

An action brought to recover *penalties* incurred by the erection of buildings in violation of the fire laws (*Sess. Laws*, 1849, p. 118) and for judgment that the buildings be taken down and removed (as a common nuisance), is an action in which a *trial by jury* cannot be dispensed with, unless with the consent of parties.

(*This opinion concurs with that of Judge BRADY in 17 How. 273, S. C., and would have accompanied that report had it been then known. As the question is of considerable importance—at least so considered by the court, by their delivering two able opinions, in the case—it is considered a sufficient explanation for the publication of Judge DALY'S opinion here.—REP.*)

New-York General Term, June, 1859.

THIS action was brought to recover penalties incurred by the erection of four buildings in violation of the fire laws, particularly designated in the complaint, and for the judgment of the court in accordance with the provisions of the statute—that the several houses be taken down and removed. When the cause was called at the special term, the plaintiff's counsel moved that it be tried by the court without a jury. The de-

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fendant's counsel claimed a trial by jury. The judge presiding decided that the action should be tried by the court without a jury, and the defendant excepted.

DALY, F. J. This is not a case in which a trial by jury could be waived, unless by the consent of the parties; nor does it come within the class of cases specified in the Code as triable by a jury; but it is, nevertheless, to be tried by a jury, unless it is a case where the remedy sought is of an equitable nature, analogous to those which the court of chancery would formerly take cognizance of, and could alone afford the entire relief asked. It is not, in my judgment, a case of that nature or kind. A court of chancery would not interfere where there was an ample remedy at law. It would interpose by injunction to restrain parties from creating or continuing a nuisance, because it could alone afford that remedy. If an erection was begun which was or would become a nuisance, it would restrain the party from the further prosecution of the work, but it had no jurisdiction to compel him to undo what was done, unless the fact of the nuisance was established by action at law. (*Bradford agt. The Manchester, Sheffield, and Lincolnshire Railway Co.*, 8 *Eng. Law and Eq. R.* 143.)

In the case cited, the defendants commenced the erection of a wall, by which the water was prevented from flowing up to the plaintiff's mill, which diverting or stopping off of water running to another mill or meadow is, by the common law, a nuisance. (*F. N. B.* 184; 2 *Eq. Abr.* 522, *pl.* 3.) Sir S. PARKER, the vice-chancellor, granted an injunction to restrain the defendants from the further prosecution of the work, but said that he could not make them undo anything actually done. The instances of the interposition of the court upon the subject of nuisance, says Lord ELDON, in the *Attorney-General agt. Cleaver* (18 *Ves.* 217), are very confined and rare; and he remarks further, upon the authority of Lord HALE, that the question of nuisance, whether public or private, unless it be the obstruction of a highway or of a harbor, is a question of fact, which must be tried by a jury; and that, though the

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court might entertain a suit to abate a nuisance, it would be bound to try the fact by the intervention of a jury. But in *Weller agt. Smeaton* (1 Cox, 102), the court went further than this. It was a suit in equity, to compel the defendant to pull down and remove certain works which obstructed the plaintiff's mill, and to restrain him from erecting new ones, and it was held that the bill would not lie, until the right was first established by an action at law.

This action is not to prevent or restrain the defendant from doing anything, but to compel him to take down and remove a building which he has erected, upon the ground that it is a nuisance, and to recover a statute penalty. A penalty is recoverable by an action at law, and it is very plain, upon the authority of *Weller agt. Smeaton*, that a bill in equity would not lie to compel the taking down and removal of a building as a nuisance, unless the fact of it being one was first established in an action at law. When the fact was ascertained by a recovery in an action at law, the court would lend its aid to compel its removal, as the plaintiff had no other remedy at law, but to bring successive actions upon the case for damages—the assize of nuisance and the writ *quod permittat prosternare*, by which a nuisance might be removed, having been abolished by statute. But in this state there was a full and ample remedy at law, without resorting to a court of equity, as in the action of nuisance, under the Revised Statutes the plaintiff had judgment, not only for his damages, but that the nuisance be removed, a provision which the Code has retained (§ 454). He had no occasion to go into a court of equity, except in cases where it could alone afford relief by an injunction to prevent or restrain.

If the buildings owned by the defendant are in violation of the act of 1849, they are, by that statute, a common nuisance, and the defendant is subject to certain penalties for causing them to be erected. By sections 25, 30, and 31 of the act, the penalty may be enforced in this court, or in the supreme court, by an action to be brought by the fire department, in which action the court may, in addition to giving judgment

for the penalty, also adjudge and decree that the building be taken down and removed, which decree it is made the duty of the sheriff to execute. There is nothing in this action of exclusive equitable cognizance. It is to compel the removal of a common nuisance, and to recover a penalty incurred by creating it. The remedy sought for the removal of a nuisance was one that was obtainable in this state, when the court of chancery was in existence, by an action at law, in which full and adequate relief was afforded, without resorting to a court of equity at all; and one that the English court of chancery would not grant, unless the existence of the nuisance was established by the judgment of a court of law; or, according to Lord ELDON, by the verdict of a jury.

I, therefore, concur with Judge BRADY, that it is an action in which a trial by jury could not be dispensed with, unless with the defendant's consent.

The case cited by the plaintiff—(*Jesus College agt. Bloom*, 3 Atk. 262)—instead of being an authority for him, is directly against him. It is very true that, if a court of equity has acquired jurisdiction, it will, to avoid multiplicity of suits, embrace other matters connected with, or growing out of the subject, though they may be cognizable in courts of law, unless they embrace objects so diverse and different as to be liable to the objection of multifariousness. Lord HARDWICKE, consequently, said in that case, that where an injunction would be allowed to stay waste, and waste had already been committed, the court would decree an account and satisfaction, for what was past; but he dismissed the bill because the plaintiff did not ask an injunction to restrain, but his bill was for an account and satisfaction. There was in that case, as it is in this, no element of equity jurisdiction, for the plaintiff could obtain all that he sought for by an action at law.

UNITED STATES CIRCUIT COURT.

ELISHA BAKER agt. THE SHIP POTOMAC.

This court, on appeal, upon a question of *fact* which has been established in the usual way, and with reasonable satisfaction before the commissioner, will not disturb the decree of affirmance of the court below, where the rebutting proof is very general and indefinite.

New-York, October, 1859.

APPEAL from a decree of the court below.

BENEDICT, BURR & BENEDICT, *for libelant.*

BEEBE, DEAN & DONOHUE, *for respondent.*

NELSON, C. J. The only question in this case arises on the report of the commissioner in the court below, in respect to the amount of repairs made, and materials furnished, to the ship Potomac. The court below placed its decision upon a defect in the exceptions taken to the report, as relating either to matters settled in the decree and not before the commissioner, or not sufficiently specific and pointed to raise the objection.

I am inclined to think the court right in both grounds stated. But, independently of this answer, I have looked into the evidence before the commissioner, without regard to formal objections, and am satisfied that the weight of it sustains the report; at least the evidence furnished on the part of the respondent, tending to reduce the amount and value of the repairs, and to change the terms upon which they were made, is so questionable, that we are not disposed to interfere with the report, as the witnesses were personally before the officer making it, and who had a better opportunity to determine the degree of credibility to be given them than we can have. The extent and costs of the repairs seem to have been established in the usual way, and with reasonable satisfaction, and the rebutting proof is very general and indefinite.

Decree below affirmed.

SUPREME COURT.

FINNEGAN agt. LEE and others.

It is the settled practice, that a *preliminary injunction* cannot be sustained, when all the *equities* of the complaint are *denied* by the answer.

State Internal Improvement Bonds, and Railroad Bonds, are negotiable securities, the title to which will pass by delivery. and, unlike certificates of stock, are valid securities in the hands of bona fide holders against existing equities between the parties.

New-York Special Term, December, 1859.

MOTION to dissolve injunction.

DAVIES, Justice. The facts appearing in this case are, that the plaintiff, being indebted to the Ohio Life Insurance and Trust Company in a large amount, deposited with said company, as collateral security therefor, one hundred and sixteen Florida Internal Improvement Bonds, of \$1,000 each, and fifty-eight Florida Railroad Freeland Bonds, of \$1,000 each.

It is alleged in the complaint, that the Trust Company transferred to the defendant, James Lee, in fraud of the plaintiff's right, for some pretended claim which he had against said company, eighty of the said Internal Improvement Bonds, and thirty of said Freeland Bonds. It is also alleged that said claim of said defendant Lee has been paid, and, notwithstanding said payment, he claims to hold such bonds. The complaint also alleges that after the payment of the debt due to defendant Lee, he knew of the fraudulent disposition of said bonds, and has refused to deliver said bonds; and that he has other collateral security for such claims. It was also alleged that the Trust Company was insolvent; that the defendant Lee was not responsible for the damages which the plaintiffs would sustain, if he was permitted to sell and dispose of said bonds as he threatened to do; and that the other defendants, the said company and its receivers, had no claim, right or title to said bonds, and have colluded with said defendant

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Lee, in the sale and disposition thereof by him. On these allegations an injunction was granted, restraining the sale and disposition of said bonds.

The defendant Lee has answered the complaint, and the facts appearing by said answer, and not controverted on this motion, are, that on the 14th May, 1857, the cashier of the Ohio Life and Trust Company deposited with the defendant Lee the said eighty bonds, as collateral security for moneys then loaned said company, and as collateral to all moneys which said company might thereafter borrow of him; and that, on the 14th of August, 1857, the said cashier deposited with him the said thirty bonds, as additional collateral security for the moneys theretofore borrowed, and for other moneys then borrowed, and thereafter to be borrowed; and he denies that he had any knowledge that said company was not the owner of said bonds, and had not good right to transfer and dispose of the same.

And he avers that said money was advanced on said bonds in the ordinary course of business, and without any notice express or implied, or any provision or reason to believe that the said company was not the sole and absolute, and lawful owners thereof, and fully entitled thereto.

A motion is now made, on the complaint and answer, to vacate the injunction.

It is clear to my mind, on examination of the pleadings in this case, that the injunction cannot stand. All the equities of the complaint are denied by the answer; and it is the settled practice, that a preliminary injunction cannot be sustained when all the equities of the complaint are denied by the answer. (*Blatchford agt. New-York and New-Haven Railroad, affirmed at General Term, 7 Abbott, 322.*) But it was earnestly contended on the argument that these bonds were to be regarded as certificates of stock, and that the defendant Lee took them subject to all the equities of the plaintiff, as against the Ohio Trust Company. The New-Haven case, in the court of appeals, is cited as an authority for this position. But that can only decide that certificates of stock are not negotiable,

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so as to cut off the equities of the parties, but does not extend to bonds, such as are in testimony in this case. I had always supposed that, since the decision of the court of errors of this state, in the case of *DeLafield* agt. *The State of Illinois*, it was the well-settled law of this state, that such securities being negotiable, they were rendered valid in the hands of a *bona fide* holder.

In that case BRONSON, Justice, in delivering the opinion of the court, which was nearly unanimously concurred in, says: "The bonds are negotiable instruments, the title to which will pass by the delivery, and although void in the hands of the appellant, they will be valid securities in the hands of a *bona fide* holder." (2 *Hill's Rep.* 177.) The same principle has been re-affirmed by the court of appeals in this state, at the March term, 1859, in the case of *Bank of Rome* agt. *Village of Rome* (19 *New-York Rep.* 20).

The court, in giving its opinion, refer to the case of *DeLafield* agt. *The State of Illinois* with approbation, as settling the rule of law. It must, then, be regarded as the law of this state.

The same rule has been laid down in the New-Jersey court of appeals, in the case of *The Morris Canal and Banking Company* agt. *Fisher* (*Am. Law Register*, 423). The books are full of cases holding a similar doctrine, and, certainly, in this state there can be no controversy that such is the law.

The motion to dissolve the injunction, as to the defendant Lee, is granted, with costs; and the undertaking, given on issuing the injunction, is ordered to be delivered to him for prosecution, that he may recover such damages as he has sustained by the issuing of the injunction.

SUPERIOR COURT.

GOODRIDGE, respondent, agt. NEW, appellant.

Where, on a motion to set aside a judgment, on the ground of a previous settlement of the action between the parties, an order of reference was made directing the referee to take proof as to the terms and conditions of the settlement, and to report the same, together with the testimony, to the court,

Held, that the referee had authority to find the facts, as well as to report the testimony taken before him; and his finding, "that the action was settled on condition that each party should pay his own costs," and subjoined to his report the testimony taken before him, was a correct construction of the order of reference.

New-York General Term, December, 1859. Before all the Justices.

APPEAL from an order made at special term.

A. J. DITTENHOEFER, *for appellant.*

TOWNSEND SCUDDER, *for respondent.*

By the court—PIERREPONT, Justice. An action was commenced in November, 1858, by the plaintiff, against the defendant, for \$805 for goods sold by plaintiff to defendant.

The answer of the defendant admitted the sale, but set up as a defence that the goods were sold on credit, and that the credit had not expired at the commencement of the action.

In January, 1859, the defendant's agent had an interview with the plaintiff's agent (plaintiff being then in Europe), and the defendant's agent paid the plaintiff the whole amount of the debt, less some interest which plaintiff abated.

This was done without the knowledge or presence of the attorneys for both parties. Subsequently, the defendant's attorney informed the plaintiff that the action was settled, each party to pay his own costs. The plaintiff's attorney de-

nied that it was so settled, and, after several interviews with the defendant's attorney, the plaintiff's attorney continued to notice the cause for trial, and finally, in June, 1859, took a judgment by default for the whole amount, and issued execution for the costs only, which amounted to some \$102.

The sole question in dispute was, whether the action was settled on the terms of each party paying his own costs, and a motion was made by the defendant to vacate and set aside the judgment.

This motion came on for hearing before me, and the affidavits being conflicting, I directed a reference to ascertain in what manner the action was settled. The order of reference directed the referee to take proof as to the terms and conditions of the settlement of the action, and to report the same, together with the testimony, to the court.

The referee made his report, and found that the action was settled on condition that each party should pay his own costs, and subjoined to his report the testimony taken before him.

The judge below, before whom the matter came up for final hearing, concluded that the referee was not directed to find the facts, but merely to take the testimony, and submit the same to this court, and denied the motion to vacate the judgment.

The defendant appealed from this order, and the court have come to the conclusions—first, That the order of reference was rightly construed by the referee; and, secondly, That the evidence taken before him sustained his finding; and the judgment of the general term, therefore, is, that the order made below be reversed, without costs to either party, on the appeal.

SUPREME COURT.

WM. P. FURNISS agt. WM. H. BROWN's administratrix.

An agreement to "fit up a steamboat (then fitted and furnished for the transportation of passengers on the Sound) in a suitable manner for her to proceed from New-York to the Pacific, *via* the Straits of Magellan, and to trade along the west coast of America, or in the rivers of the same"—*held*, when thus fitted, not a guarantee of the capacity of the steamboat for ocean service, or to encounter storms at sea at a great distance from land.

New-York General Term, October, 1859.

MOTION by defendant for a new trial.

CHARLES O'CONOR and CHAS. A. PEABODY, *for defendant*.
SANDFORD & STRIKER and W. C. NOYES, *for plaintiff*.

By the court—ROOSEVELT, Justice. The only part of this controversy which it is now necessary to consider, is that which relates to the loss of the steamer Rhode-Island, wrecked a few days out, on her voyage from New-York to California, in the winter of 1850.

At the trial, which took place before the late Mr. Justice MORRIS, a verdict was found against the defendant, as the administratrix of her deceased husband, Wm. H. Brown, for \$39,894.50, for his default in properly fitting up the vessel. This verdict is now sought to be set aside on various grounds, and among them the alleged insufficiency of the evidence to sustain either that or any other verdict against defendant.

Brown, a distinguished ship-builder, was the owner, it appears, of the vessel in question. On the 1st. of November, 1849, he sold to Furniss, the plaintiff, an undivided half interest in her. By the terms of the contract (in writing), the price was to be "at the rate of \$50,000 for the whole boat," payable in the notes of the purchaser at fifteen months. The subject of the contract was described as on "the steamboat Rhode-Island, burden 1,000 tons, or thereabouts, with all her

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tackle, appurtenances, boats, and furniture, as she is now completely fitted and furnished for the transportation of passengers on the *Sound*." Brown, however, was "to proceed and fit up said steamboat Rhode-Island in a suitable manner, for her to proceed from New-York to the Pacific, *via* the Straits of Magellan, and to trade along the west coast of America, or in the rivers of the same, as may be thought most advantageous by said William P. Furniss after her arrival there."

Brown, it will be seen, sold the half of the vessel, not as an ocean steamer, but as a river and coastwise steamboat. And, although he stipulated "to fit her up in a suitable manner," he did not stipulate to rebuild her. He was to make her "fit for sea," but we do not understand, by the use of those terms, that the parties contemplated that a river "steamboat," built for river navigation, was to be changed into a sea steamer. She was to be "fitted," as far as such a steamboat could be fitted, for a single sea voyage. And this interpretation of the contract is confirmed by the amount to be laid out, which was "not to exceed \$10,000, and as much less as possible"—Furniss paying one half—a sum obviously insufficient to convert an ordinary steamboat into an ocean steamship. Brown, in point of fact, at his own cost, laid out nearly double the stipulated sum. And Furniss, before giving his notes, saw the vessel as she was fitted up for the voyage, and, without complaint, took possession of her. He was a merchant, engaged in the shipping business, and as competent, probably, to judge of the prudence of sending such a vessel on such a voyage as Brown. They both took the risk; and we think the evidence given on the trial was wholly inadequate to show that she was lost from any omission on the part of Brown, or from any other cause than the inherent insufficiency of any mere "steamboat," however "fitted up," to encounter storms at sea at a great distance from land.

The jury, in weighing the evidence, would seem to have acted upon the idea that Brown had guaranteed the capacity of the steamboat for ocean service. In this we think they erred.

A new trial must be granted—costs to abide the event.

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COURT OF APPEALS.

PARSONS agt. LYMAN.

It is well-settled law that *personal property has no liability*. It is subject to the law which governs the *person* of the owner.

But the right which an individual may claim to personal property in one country or state, under title from a person domiciled in another, can only be asserted by the legal instrumentalities which the institutions of the country or state, *where the claim is made*, have provided.

It is well settled in this state, that an *executor or administrator*, appointed in *another state*, has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed.

But if residents of this state have in their possession the property which belonged to a party domiciled in another state or country, or are indebted to him, they may, of course, recognize any valid title claimed under him, arising out of an act *in pais*, by testament, or by succession upon intestacy, and may, where no legal lien exists here, *voluntarily deliver over* the property, or *make payment* of the debt to an executor or administrator claiming under appointment by a foreign jurisdiction; and when thus delivered over and paid, there is no occasion for the agency of our jurisdiction and laws, and we have no further concern with the matter.

The executor or administrator, in such case, is subject to the same legal pursuit, by the parties whom he represents, or who are interested in the trust, as though he had received the assets *at the domicile of the former owner*.

Therefore, in the absence of any administration in this state, payment of assets here can only be made to the executor appointed under the foreign jurisdiction; and if all the creditors and legatees of the testator resided here, they could not prevent the payment to such executor, except by attaching the debt under a local law, or by *themselves procuring administration here*.

In this case, the executor was appointed by the probate court of Connecticut, the testator's domicile, and assumed the administration of the estate, and subsequently took out letters testamentary before the surrogate of the city of New-York, to collect in a portion of a large amount of assets arising upon promissory notes, leasehold houses, and insurance stock, in the city of New-York—a part of such assets (the promissory notes) having been, previous to the issuing of letters in New-York, collected and received by the executor from voluntary payments made by the New-York debtors.

Held, that, the executor being justified in making these collections without suit, there was no distinction between the assets thus realized and the assets which, at the death of the testator, were situated in Connecticut. The rule is, that

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the executor is liable to account in such jurisdiction where he receives his authority for the assets collected by virtue of that authority.

Therefore, the surrogate of New-York, in assuming to make a decree for the distribution of the assets realized and placed under the jurisdiction of the court of probates in Connecticut, long before the executor applied for letters here, was clearly in error. He had no jurisdiction, except as to the increase and proceeds of the leasehold property and insurance stock; and as to these funds, the surrogate of New-York had no authority to make distribution, by attempting to execute the trusts of the will; after settling the accounts of the executor in reference to those funds, the executor should be allowed to administer *all* the assets of the estate under the direction of the court in Connecticut from which he received the first letters testamentary. This court was not, therefore, called upon to pass upon questions of the construction of the will, but those questions should be left to the courts in Connecticut, whose duty it was to decide all questions regarding the distribution of the assets.

September Term, 1859.

THE testator, Samuel Parsons, a resident of the state of Connecticut, and domiciled there, made his will in that state, and died there October 24, 1848, leaving a widow and four children—one son and three daughters—all minors at the time of his death; and an estate valued at about \$147,000, a portion of which consisted of a leasehold interest in two houses and lots in the city of New-York, valued at about \$18,000, six shares of the stock of an insurance company in New-York, and promissory notes against persons and firms in the city of New-York, amounting to about \$84,000. The testator, by his will, dated the 7th day of October, 1848, after giving and devising to his wife his homestead, with the furniture, books, carriages, &c., and a piano-forte to his daughter Catharine, and an annuity of \$700 to his wife, to be paid to her by his executors out of his estate, until her decease or marriage, gives and devises all the residue of his estate to his executors, named in the will (David Lyman, the respondent, and Elizabeth Parsons, the testator's wife), in trust, two-fifth parts thereof for the sole use and benefit of his son, Joseph H. Parsons, and his heirs and assigns forever, and the remaining three-fifth parts for the sole use and benefit of his daughters, Catharine, Elizabeth, and Caroline, in equal shares to them respectively, and their respective heirs and assigns forever. The testator then

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declares how and in what manner the trustees are to apply and dispose of the trust-fund for the use and benefit of his children and their issues. During their minority, respectively, the trustees are directed to expend for their support respectively such sums as may seem expedient, charging the sums expended for each toward his or her share of the estate. The trustees are directed to pay his son, on his attaining the age of twenty-one years, \$5,000, and a further sum, not exceeding \$5,000, if they think it will be for his interest. On his attaining the age of twenty-three years, they are directed to pay him such an amount as they shall deem it most for his interest to receive, not exceeding \$10,000; on his attaining the age of twenty-five, such sums as in their discretion they shall deem it most for his interest to receive, but not exceeding in any one year \$10,000; and they are directed so to continue to make such payments, from one period of two years to another, until the share of the son shall have been paid off and discharged.

The trustees are to pay to each of the daughters \$2,000, on their respectively attaining the age of twenty-one, and every two years thereafter \$2,000, until the share of each shall have been paid off; but the trustees, in the exercise of a sound discretion, after the first payment to the daughters, are authorized to diminish the subsequent payments, provided they use no unnecessary delay in making the ultimate payment of the share of each daughter.

If the son dies before receiving his share, leaving no lawful issue, then his share remaining in the hands of the trustees is to be paid over in equal shares to his daughters. If any one or more of his daughters should die before receiving payment of their respective shares, leaving no lawful issue, their shares remaining unpaid shall be paid, two-fifths of each to the son, and the remainder to the surviving daughters.

If any one or more of the children die, leaving lawful issue, such issue shall be entitled, in equal portions, to the share or shares of the respective parent or parents remaining in the hands of the trustees; but in such case the trustees are to hold

and dispose of such share or shares in such manner that such issue only, and their legal representatives, and no other person or persons, shall have the benefit or advantage thereof.

The executors are directed to sell the real estate in New-York and Connecticut, and to add the proceeds thereof to the general fund. The funds arising from the bills of exchange and promissory notes, as well as all other funds coming into their hands, are directed to be invested in safe interest-paying national or state stocks, and some few banks of character and credit. No distinction is given as to the interest or income of the estate as distinguished from the principal.

The will was proved in the state of Connecticut, and its execution assumed by the executor and executrix, October 27, 1848. Probate of the will was granted by the surrogate of New-York, Nov. 6, 1848, but letters testamentary were not taken out in New-York until March 15, 1855, when Mr. Lyman, the executor, gave a bond, and became qualified to act. On the 3d of December, 1856, the executor filed his petition for a final settlement of the accounts of the estate before the surrogate of New-York, and cited in all the parties interested to attend the adjustment. On the return of the citation, January 15, 1857, the accounts were filed; the legatees who were of age appeared by counsel, and the case was adjourned to January 29, and again to February 10, on which latter day the legatees presented a petition for a compulsory accounting and for distribution. The cause was set down for March 10th, when the counsel for the executor moved for a postponement, on the ground that there was a doubt as to the correct interpretation of the will, and his client had (subsequent to this application for a final accounting) instituted a suit to establish its construction before the superior court of Middlesex county, Connecticut.

The surrogate decided that the proceeding would not be postponed for such purpose, after the legatees had appeared and claimed a final settlement; that, upon a final accounting, it was the duty of the surrogate to look into the provisions of the will, interpret its language, and direct a distribution ac-

ording to the tenor and effect of its provisions; that the legatees took, on the testator's decease, an absolute vested interest in their respective portions as tenants in common; that the provision in regard to payment and executory bequests over, related only to the *corpus* or principal of the estate, and not to the income; and that the legatees were entitled absolutely to the profits and income of their shares from the time of the testator's death. Also, that a foreign executor, having collected assets in this state before letters testamentary issued, and having subsequently qualified, was bound to account, as executor, for such collections to the court by which he was appointed; the letters relating back, for that purpose, to the time of the testator's death.

The supreme court of errors in Middlesex county, Connecticut, ELLSWORTH, J., *held*, that by the true construction of the will the surplus annual income of the testator's estate, held in trust by his executors and trustees, after making provision for the payment of the annuity to the widow, and of the annual charges of the executors and trustees for their services and expenses, should be, by the executors and trustees, retained and invested, and added yearly to the principal of said estate, until needed for the biennial payments to the children of the testator, as directed in his will, and should not be yearly paid and distributed to said children in addition to said biennial payments to them.

On appeal from the decision of the surrogate of New-York, the supreme court, by SUTHERLAND, J., *held*, that the construction of the will by the supreme court of errors of Connecticut was the true construction, and that of the surrogate of New-York was erroneous. Also, that that part of the decree of the surrogate of New-York, adjudging and decreeing that the appellant should account to the said surrogate for the assets realized by him from persons and firms residing in the city of New-York, and paid to the executor before letters testamentary were granted by the surrogate, was equally erroneous, and should be reversed.

Also, that it was settled, that the will was to be interpreted,

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and the personal estate disposed of and distributed, according to the laws of the country (Connecticut) in which the testator had his domicil at the time of his death; consequently, that part of the surrogate's decree, declaring that the trustees have the discretionary power to pay the testator's son, Joseph H. Parsons, \$20,000 biennially, out of the principal of his share, as distinguished from the income ordered to be paid over to the children by the executor, was erroneous, and should be reversed.

The respondents, Joseph H. Parsons, Catharine M. Parsona, William Stanley and Elizabeth A. Stanley his wife, and Caroline Parsons, appealed from the decision of the supreme court to this court.

WM. STANLEY and D. D. FIELD, *for appellants.*
HIRAM KETCHUM, *for respondent.*

DENIO, J. It is an established doctrine, not only of international law, but of the municipal law of this country, that personal property has no liability. It is subject to the law which governs the person of the owner, as well in respect to the disposition of it by act *inter vivos* as to its transmission by last will and testament, or by succession upon the owner's dying intestate. (*Story's Con. of Laws*, § 376-383, and cases in note to § 380; 2 *Kent's Com.* 428-9; *Holmes agt. Remsen*, 4 *John. C. R.* 460; 4 *Con.* 517, note; *Shultz agt. Pulver*, 3 *Paige*, 182; 11 *Wend.* 363, *S. C.*; *Vroome agt. Van Horne*, 10 *Paige*, 559.) The principle, no doubt, has its foundation in international comity, but it is equally obligatory as a rule of decision in the courts, as a legal rule of purely domestic origin. It does not belong to the judges to recognize or to deny the rights which individuals may claim under it at their pleasure or caprice; but it having obtained the force of law by uses and acquiescence, it belongs only to the political government of the state to change it, whenever a change becomes desirable. But the right which an individual may claim to personal property in one country, under title from a person domiciled

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in another, can only be asserted by the legal instrumentalities which the institutions of the country where the claim is made have provided. The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed, but in respect to the legal assertion of that title, it has no extra territorial force. As a result of this doctrine, it is now generally held everywhere, and it is well settled in this state, that an executor or administrator, appointed in another state, has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed. (*Morrell agt. Dickey*, 1 *John. Ch.* 153; *Doolittle agt. Lewis*, 7 *id.*, 45; *Vroome agt. Van Horne*, *supra*.)

But if residents of this state have in their possession the property which belonged to a party domiciled abroad, or are indebted to him, they may of course recognize any valid title claimed under him, arising out of an act *in pais*, by testament or by succession upon intestacy, and may voluntarily deliver over the property, or make payment of the debt. Our jurisdiction is not violated, or our tribunals in any respect condemned by such a transaction. Simply, our laws are not invoked because, in the case supposed, there is no occasion for their agency. If the property or money is, therefore, taken by the new possessors into the foreign jurisdiction, we have no further concern with the matter. If the claimant, whose demands have thus been conceded, is himself a trustee for others, as in the case of an executor or administrator, he is subject to the same legal pursuit by the parties whom he represents, or who are interested in the trust, as though he had received the assets at the domicile of the former owner. The fact, that these assets were at one time within our jurisdiction, or had existed in the shape of a debt owing by a resident of this state, is of no legal consequence. In stating this position, I, of course, exclude any consideration of cases where a lien by way of attachment or otherwise had been fastened upon the property, or any claims of a domestic executor or administrator had attached to it before it had passed into the hands of the party claiming under the foreign title. I might also ex-

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clude the case of beneficiaries of a trust residing in this state, as legatees or creditors of a testator whose executors, appointed in another state, had come here and received, by voluntary delivery or payment, the personal assets of the estate: for, in the case before us, the respondent received, in Connecticut, and invested the moneys for which he has been adjudged liable to account to the surrogate of New-York, while every person interested in the estate was a resident of the state of Connecticut. But if that were otherwise, I conceive that it would make no difference. It was the duty of the debtors to pay what they owed the testator to him while living, and according to his appointment after his death. By a testamentary act, perfectly valid everywhere, he appointed the respondent to receive these moneys. The legatees were in no privity with the debtors of the estate in New-York or elsewhere. They could only claim through the respondent as executor. In the absence of any administration in this state, payment could only be made to the executor appointed in Connecticut, and if all the creditors and legatees had resided here, it would have been impossible for them to have prevented the payment to the executor, except by attaching the debt under a local law, or by themselves procuring administration here. These positions seem to me to flow so naturally from conceded principles, that I should feel quite confident of their correctness if they were not recognized by any adjudged case. But they have been repeatedly recognized. In *Atkins agt. Smith* (2 *Atk. R.* 63), Lord Chancellor HARDWICKE declared, that ecclesiastical jurisdictions were limited within their particular districts, and that an administration taken out in England would not extend to the colonies in America; but he said, that if an executor sends over an exemptive action of a probate to Maryland, or any other colony, the person who is employed as an agent there by the executor may, by letters of attorney from him, collect in the effects of the testator, and he is chargeable as much as if the executor had got them in himself. In *Williams agt. Steers* (6 *John.* 363), Chancellor KENT expressed the opinion that a voluntary payment, if by probate

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here, to a Connecticut administrator, would be good. In *Doolittle agt. Lewis, supra*, he repeated the same opinion. In deciding that foreign administrators could enforce a power of sale contained in a mortgage to their intestate upon lands in this state, he inquired, "Can they not give a voluntary discharge of a mortgage, without clothing themselves with the office of an executor or administrator, under the judicial authority of this state? And is not the policy of the law sufficiently answered, when our courts refuse to lend their assistance to any authority not derived from our own laws, touching the administration and distribution of assets? If the parties can transact their own business according to their own agreement, without asking the aid of our courts, why may they not lawfully do it?" It was unnecessary to decide the point in either of these cases; but in *Shultz agt. Pulver, supra*, which was affirmed in the court of errors, an administrator, appointed by the surrogate of Columbia county, was compelled to account for, and was charged with, the amount of a debt owing to his testator by a solvent debtor residing in Pennsylvania, on account of a neglect to use due diligence in obtaining payment.

In *Vroome agt. Van Horne, supra*, Chancellor WALWORTH stated, that the results of the cases in this state seemed to be, that a foreign execution or administration, appointed by the decedent's domicil, was authorized to take charge of the property here, and to receive debts due to the decedent in this state, where there was no conflicting grant of letters here, and where it could be done without suit. The same principle is stated as good law by Judge STORY in *Trecothick agt. Austin* (4 Mass. 33), though rather by way of illustration than as a point adjudged.

Assuming, then, that the respondent was justified in collecting in the moneys due the estate by the New-York debtors, so far as he was able to do it without suit, I do not see how it is possible to state any distinction between the assets thus realized, after they were so realized, and the assets which, at the death of the testator, were situated in Connecticut. The

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respondent was accountable for the whole to the probate court in Connecticut, and it would be exceedingly preposterous for him to set up any exception from accountability, arising out of the circumstance that the moneys had been paid by debtors residing in another jurisdiction when the moneys were paid, and for many years afterwards. There was no person residing in New-York who had even the smallest interest in them. By the general rules of law, the debts thus converted into money had no locality other than that of the creditor's domicil in Connecticut; and when they had been thus converted, and the avails had been brought into the jurisdiction of the creditor's domicil, their origin and former history became immaterial, as I conceive, for any purpose whatever. Besides, they were not only brought into Connecticut, but were placed under the control of the probate court of that state. The annual accounts rendered by the respondent to the court, by which he reported the manner in which the moneys were invested, and the action of the court in accepting and allowing his repeated accounts and schedules, was the exercise of the jurisdiction of the court respecting them, as full and emphatic as though the moneys had been paid into court, and had been invested by one of its officers, pursuant to its orders. The idea of subsequently withdrawing them from the jurisdiction, and subjecting them to the jurisdiction of the probate court of New-York, appears still more unreasonable, when we consider, what is admitted on all hands, that the construction of the will, and the respective titles, rights, and duties of the executors and of the legatees, must be ultimately determined according to the law of the testator's domicil, namely, that of the state of Connecticut. If the administration of these assets is to be conducted under the orders of the surrogate of the county of New-York, still the rule of decision is the law of Connecticut, which the New-York court must ascertain by proof and apply by judgment. Clearly, the jurisdiction should not be transferred from the country of the testator's domicil to New-York, unless it is required by some imperative

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rule of law. I feel confident that it is not required or permitted by any legal principle whatever.

But it is said that the executors have voluntarily submitted these assets to the jurisdiction of the surrogate's court, by appearing and taking out letters testamentary in New-York, and by subsequently asking for the settlement of their accounts before the surrogate. But it is certain that this was not the intention of the executors, and the acts themselves do not naturally look to any such results. There were assets yet remaining in New-York, namely, the leasehold houses and the insurance stock. This presented a legal occasion for the executors' clothing themselves with probate authority in this state, quite independent of any consideration relating to the realized assets which they were administering under the authority of the probate court in Connecticut. Having converted the leasehold estate into money and securities, it became necessary for them to account, before the surrogate, in respect to that portion of the estate. When they applied for the citation, the reasonable inference surely is, that they designed to adjust the matters which were properly cognizable before the surrogate, and not those to which his jurisdiction did not extend; and when on the return of the citation, which was their first appearance in the surrogate's court, they brought in their accounts, the nature of the proceeding became quite apparent. These accounts were limited to the leasehold houses and the insurance stock; and there was no reference to any other portion of the estate.

The nature of this second administration, and its relation to the primary administration in Connecticut, will be subsequently adverted to, but at present it is enough to say that the surrogate's letters did not confer on the New-York court any jurisdiction over the assets which were in the course of administration under the orders of the Connecticut court. It has already been shown that there was no difference, as to the probate jurisdiction, between the money realized before the taking out of letters here from New-York debtors and that which arose out of property situated in Connecticut. The

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surrogate did not consider that the New-York letters gave him jurisdiction over the latter, for he disclaimed any interference with what he considered properly Connecticut assets, and limited himself to disposing of the portion of the general assets which had been paid by debtors residing here, and the leasehold houses and insurance stock. In this disclaimer he was clearly right. Suppose a person dying here to have assets in several states of the union—a case which may often happen—administration taken out here would not be recognized in the other jurisdictions, and it might therefore be necessary for the administrator, by himself or by his agents, to take out letters in several other states. Under what authority the assets realized under these subordinate administrators should be finally distributed may be questionable, but certainly no one will contend that the fact of taking out letters, for instance in Texas, for the collection of a small debt there, would confer upon the probate court of that state the administration of the assets realized here at the place of the domicile of the intestate. The true rule is, that the executor is liable to account in such jurisdiction where he receives his authority, for the assets collected by virtue of that authority. (*Story's Con. of Laws*, § 513.)

I think it very plain, from these considerations, that the surrogate fell into an error in assuming to make a decree for the distribution of the assets realized, and placed under the jurisdiction of the court of probates in Connecticut, long before the executors applied for letters testamentary in this state. He had no jurisdiction, except as to the increase and proceeds of the leasehold property and the insurance stock. This would lead to the simple reversal of the surrogate's decree, so far as it was appealed from by the respondent, for it is impossible to separate the directions given in it respecting the Connecticut assets, of which he had no jurisdiction, from those to which his jurisdiction extended.

But, upon the record being remitted to this court, the surrogate will be called upon to make a decree for the disposition of the money and securities in the hands of the executors,

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arising out of the leasehold houses and the insurance stock. The position of the respondent is, that, in stating the account of these assets, he is entitled to carry the balance in his hands into his accounts with the estate as administered under the direction of the probate court of Connecticut; so that his administration in this state being thus closed, the estate shall be thenceforward administered as an entirety under his first appointment in Connecticut.

The appellants, on the other hand, maintain that no such transfer can be made, but that the surrogate must continue to exercise the jurisdiction over this portion of the assets until the administration is finally closed. The determination of this question would, as a practical matter, involve only considerations of economy and convenience, were it not for the difficulty which has arisen upon the construction of the will, as to which it is possible that the courts of the respective states may eventually hold different opinions. The question of construction does not appear to depend upon any local laws of the two states, for if it did, it is conceded that the law of Connecticut must govern; but it depends rather upon the interpretation of the language of the will—the principles of law applicable to the instrument being mainly, though not entirely, the same in both states. It does not necessarily follow, because the Connecticut law must furnish the rule, that the courts of that state only are competent to pass upon the question, for it frequently happens that the right to money or property in litigation in the courts of one state is to be determined by the law of another. If, however, the solution of the question, as to the proper court for administering these New-York assets, depends upon the special circumstances of the case, and is in any respect matter of judicial discretion, then the consideration, that the law of the domicile is the one to be applied, affords a reason of some weight in favor of remitting the questions to the courts of the government where that law is the one habitually administered.

It is also to be borne in mind, that there are no creditors of the estate in this state or elsewhere, and that though the lega-

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tees have now a residence here, they were all, when the trust was created by the death of the testator, and for many years afterwards, domiciled in Connecticut, and that they have since come here voluntarily. The other facts bearing upon the question are, that, in any event, the greater portion of the estate is to be administered in Connecticut—the amount of the assets there being about five-sixths of the whole; that the executors, one of them being also a beneficiary, resided there. The legatees must necessarily remain suitors of the Connecticut court of probate in respect to the greater part of their interest in the estate. The appellants are residuary legatees, and the amount constituting the residue must always depend upon the allowance to be made to the executors for losses and expenses, as to which it is certainly possible that the two probate tribunals may differ in their judgments. These considerations, and the general propriety and manifest convenience of a unity of judicial action in respect to a matter essentially entire and indivisible, would lead me to adopt the respondent's views, if consistent with the rules of law.

The general provisions of the Revised Statutes relative to the returning of inventories, the accounting of executors and administrators, and enforcing the payment of debts, legacies, and distributive shares, do not contemplate the administration of a part of an entire estate, the residue of which is subject to the control of some other probate tribunal. For instance, the inventory is to embrace an account of all the interests of the deceased, without any exception; the accounting is to be of the assets generally; the entire indebtedness of the deceased is to be paid, and the whole estate is to be distributed among creditors, legatees, widow, and next of kin, according to their respective rights, and the surrogate is to settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share, to whom the same shall be payable, and the sum to be paid to each person. So the distribution of property not bequeathed is to be made according to certain rules of succession, which may differ widely from those which obtain in other states. (2 *R. S.*, p. 82, § 2; p. 84, §§ 11, 12,

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16; p. 87, § 27; p. 92, §§ 52, 54; p. 93, § 60; p. 85, §§ 70, 71; p. 96, § 75.)

I do not doubt but that these provisions could be accommodated to the case of separate administrations of the same estate under different governments, though they refer in terms to domestic administrators of an entire estate; but they claim that it was not within the contemplation of the legislature that a case could arise where an estate would be subject to two probate jurisdictions. Under the direction to determine all questions respecting an alleged debt or legacy, a conflict between the two jurisdictions might naturally arise. In the case before us there is a question of considerable difficulty upon the construction of the will, whether the executors have a discretion to pay Joseph H. Parsons twenty thousand dollars every two years, or only ten thousand dollars? and upon this point the supreme court of errors in Connecticut and the surrogate here entertain different opinions. The surrogate would, no doubt, feel bound to decree payment according to his construction of the will, so far as the assets under his control should extend, while the Connecticut court of probates, acting under the construction established by the highest court in that state, might very naturally consider this an over-payment, and withhold the amount supposed to be overpaid from the next biennial payment. So the last-mentioned court might consider the payment of interest which the surrogate would judge it his duty to order, as legally applicable to the fixed payments directed by the will, and direct the future instalments to be diminished accordingly. I need not enlarge upon the inconveniences and embarrassments which would be likely to arise out of this double jurisdiction over the same estate; for if by law the assets are necessary to be administered in this way, they must be encountered as they best may.

But I am of opinion that the surrogate may, and that in this case he ought, after having adjusted the accounts of the executors, and ascertained the net amount of New-York assets with which they are chargeable, to remit the jurisdiction in respect to future directions, to the court of probates of Con-

necticut. The only provisions of the statute in any way affecting the question, is that which authorizes a surrogate to recognize and issue letters testamentary upon a foreign will, upon the production of an authenticated copy of it, under the seal of the foreign court before which it was proved; and the one which declares, that where a will has been made by a person not domiciled here, but leaving assets in this state and letters testamentary, or if administrations have been granted upon it by competent authority in any other state of the United States, the person so appointed, on producing such letters, shall be entitled to letters of administration here, in preference to any other person, except a relative entitled thereto, and except the public administrator of the city of New-York. (2 R. S., p. 67, § 68; *id.*, p. 75, § 31.)

It is apparent from this, that the legislature contemplated that in certain cases the same person might be an executor or administrator under the laws of another state, where the deceased was domiciled at his death, and also as to assets here under the laws of this state. It also appears that a discrimination was made in favor of the probate courts of a sister state of the union over those of a foreign country; for the recognition of other letters testamentary is limited to such as had been issued by competent authority in the United States. The effect of letters issued here to an executor or administrator, producing similar authority from another state, is not declared in the statute; nor do I find that the courts of this state have ever been called upon to pass upon such a question. Chancellor WALWORTH speaks of such letters as auxiliary to those issued by the courts of the testator's domicil. (*Vroome agt. Van Horne, supra.*) No doubt such letters confer the usual power to reduce the assets to possession and clothe the surrogate and court with authority to call the executor or administrator to account, and to make a decree for the disposition of assets. It does not, however, follow, that in the case of an executor, the power simultaneously existing in the probate court of the testator's domicil is to be lost sight of, or that the dispositions of the will must be fully executed here to the

extent of the effects realized under the surrogate's letters. The only adjudications which I have found bearing direct upon the question are those in the supreme judicial court of Massachusetts, and the circuit court of the United States, sitting in that state. In *The Selectmen of Boston agt. Boylston* (2 Mass. 384), it was held, that a person who had taken out letters testamentary in England, as executor of a will of a person domiciled and dying there, and had afterwards issued the will in Massachusetts (which, by statute of that state, was equivalent to letters of administration), was not bound to account in Massachusetts for assets received in England. The case came before the court again, and, although the point decided there is not important here, it was said by the court, in stating the grounds of their decision, that the administration in Massachusetts was to be considered not only as a means of collecting the effects of the testator within that jurisdiction, but of answering, according to the rules of the same jurisdiction, the demands of creditors, and of all legal liens upon these effects. The town of Boston was the residuary legatee under the will in question, which was that of Thomas Boylston. The court added, that the selectmen of Boston had, therefore, a direct and immediate interest in the account of the administrators, and in every process which could be instituted to determine the amount of the effects collected, and the charge to which they were justly liable; or, in other words, in ascertaining the residuum of the testator's effects within that jurisdiction.

The general question next came before the court in *Richards agt. Dutch* (reported in 8 Mass. 506). The plaintiff was an administrator, with the will annexed, of one Murray, who was domiciled at Calcutta, where he died. He took out letters of administration in Massachusetts, and sued the defendant for the avails of goods consigned by the testator to him in Massachusetts. The defendant set up that he was a legatee under the will of the testator of the very property for which he was prosecuted. 'This depended upon certain language in the will, by which the testator gave certain property, which he had sent to America, to the person to whom he had sent it, in general

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terms, and the question was, whether the defendant and the property which he claimed to hold were embraced in it. There was a verdict for the defendant which the court set aside, and one of the grounds of the judgment was, that in the case of administration in Massachusetts, on a foreign will, the administrator may be held to pay debts due to creditors here, if any such are claimed of him; but legatees, who claim only from the bounty of the testator, must resort to the country of the testator, where the will was originally proved, and by the laws of which his effects were to be distributed.

The controversy upon the will of Thomas Boylston came before the court again in a case reported in 9 *Mass.* 337, which was an action on the bond taken upon granting administration in Massachusetts, and was prosecuted for the benefit of the town of Boston, as residuary legatee under the will. The question now under consideration was directly involved, as the court were called upon to declare whether the bond was forfeited, and, if it was, what should be the amount for which execution should issue. It was held that the administrator was bound to account and to pay the domestic debts, if any, but that he was not compellable to pay the legacy to the town of Boston, or any part of it. The court say: "The rights of legatees, especially of residuary legatees, as well as of the next of kin in the case of intestacy, depend upon the laws of the country where the deceased had his home or domicile, from whom the bequest or succession is claimed, and for that purpose all the choses in action, and personal effects, are to be deemed local, and to be there accounted for and finally administered whenever collected or accruing to the executors or administrators. The administration granted within this state has been forcibly styled auxiliary, in respect to the administration in the prerogative court. The defendant has an authority to collect and pay debts, and is liable for the contracts and debts of the testators recoverable, and which may be enforced within this jurisdiction; but he is not liable in the court of probate, upon any partial account to be there rendered and adjusted, to a decree either of payment or of distribution,

whether for a legacy or to one claiming by a supposed succession of the deceased's effects." The court held that the defendant was liable to render an account of the effects realized by him in Massachusetts, and was not bound to do anything more. The case had additional weight on account of the fact that the residuary legatees were a Massachusetts municipality, and that the testator must have contemplated that the legacy would eventually be payed there. If these legatees had been Englishmen, domiciled in England at the testator's death, and afterwards changed their residence, the case would have been parallel with the one now before the court.

The same principle was recognized in *Fay agt. Haven* (3 Met. 109, 114). A person domiciled in Louisiana made his will there, appointing executors, who took upon themselves the administration, and one of them afterwards came to Massachusetts and took out administration there. The court said, that the administration in Massachusetts was merely auxiliary, and this duty devolving upon the administrator would be to collect the debts here, and appropriate so much of the avails of the same to the payment of the debts due to the citizens of Massachusetts as would be authorized by the general solvency or insolvency of the estate, and remit the balance to the place of the principal administrator. (See also *Jennison agt. Hagg*, 8 Pick. 77; *Paris agt. Heals*, 3 id., 128.) In the last case the court say, that possibly the assets collected under the auxiliary administration might be directed to be paid to legatees living in the jurisdiction of such administrator, unless the circumstances of the case should require the funds to be sent abroad.

Judge STORY, in the interesting case of *Harvey agt. Richards* (1 Mason, 380), has examined the question with very great attention. He considers it to be well settled in Massachusetts, in the way I have mentioned, but that it is limited in its application to the probate courts, and does not extend to suits in equity brought in the federal courts in that state. And it is proper to say, that he does not approve of the extent to which the doctrine has been carried, even in respect to the court of

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probates. He considers the correct rule, upon principle, in all courts to be this, that whether the court which is not that of the testator's domicil, but in which administration has been subsequently obtained, ought to decree distribution or remit the property abroad, is a matter not of jurisdiction, but of judicial discretion, depending on the peculiar circumstances of each case; that there ought to be no universal rule on the subject, but that every nation is bound to lend the aid of its own tribunals for the purpose of answering the right of all persons having title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities. The case before him was a bill in equity in the circuit court of the United States in Massachusetts. It was a case under the same will mentioned in *Richards* agt. *Dutch*, the primary administrator being in Calcutta. The property which was the subject of the suit had been sent by the testator to Boston, and it was not embraced in the will made in Calcutta, but in the personal property unbequeathed, and was not a residue. The next of kin resided in Massachusetts, and the administrator in that state was a different person from the executor in Calcutta. Distribution to the next of kin was decreed.

I have come to the conclusion, in accordance with the views of Judge STORY, that whether the funds realized here, after payment of domestic debts, ought to be left in the hands of an executor, appointed by the probate court of the testator's domicil, in a sister state, to be fully administered under the orders of that court, should depend upon the special circumstances of each case; and that, in the one under consideration, the considerations which have been adverted to forbid the surrogate to attempt to execute the trusts of the will in this jurisdiction; that, after settling the accounts of the respondent, the latter should be allowed to administer all the assets of the estate under the direction of the court in Connecticut, from which he received the first letters testamentary. We are not, therefore, called upon, I think, to pass upon the questions of construction arising upon the will; but we leave them

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to the court whose duty it thus becomes to decide all questions regarding the distribution of the moneys of the estate.

The effect of the judgment of the supreme court is, to reverse the whole of the surrogate's decree appealed from by Mr. Lyman, and to require the executors to account for the assets realized in New-York, after the issuing of letters testamentary here. The views expressed in this opinion will be accomplished by a general judgment of affirmance of the supreme court. What has been said respecting the principles upon which the account is to be taken, and the disposition of the net balance of the New-York assets, will no doubt be conformed to in the further proceedings before the surrogate. The costs of both parties in this appeal are to be paid out of the trust fund.

SUPREME COURT.

JACOB SHARP agt. THE MAYOR, &C., OF THE CITY OF NEW-YORK.

The constitutional provision of the right of "trial by jury, in all cases in which it has been heretofore used, shall be inviolate forever," cannot be too faithfully preserved; and any legislative provision tampering with it should at least be very strictly construed.

Compulsory references should be rigorously confined to cases invoking the examination of a *bona fide* account in an action of *contract*, and should also be literally and truly a *long account*.

Where the action was for damages for representations by the defendants' agents in relation to the extent of a certain right, which afterwards proved to be false, and the affidavit on the motion for a reference stated that the trial of the action would occupy a *long time*, and that a number of separate and distinct *facts* would have to be proved by a large number of witnesses,

Held, that the court granting the reference in the action, under these circumstances, without the written consent of the parties, manifestly exceeded its powers, and committed a grave error.

Where, under the act of 1859 (*Laws of 1859, p. 1127*, authorizing the comptroller of New-York city to apply for the opening of judgments in certain cases), the

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comptroller swears that the action is unfounded and fraudulent, and this relief, whether subsequently substantiated by direct proof or not, is a sufficient justification to him for instituting the proceeding. (*On this point see S. C., ante, p. 97.*)

New-York Special Term, December, 1859.

THIS was the renewal of a motion on the part of the comptroller to open a judgment recovered by plaintiff against the city, upon the report of a referee for \$40,953.56. The motion was at first denied by Justice INGRAHAM, with leave to renew.

WM. CURTIS NOYES, *for comptroller.*

D. DUDLEY FIELD, *for Jacob Sharp.*

RICHARD BUSTEED & WM. FULLERTON, *for the corporation.*

CLERKE, Justice. By the 5th section of an act entitled, "An act to enable the supervisors of the city and county of New-York to raise money by tax" (*Laws of 1859, p. 1127*), the comptroller of the city, when he has reason to believe that any judgments of record against the mayor, &c., or which may thereafter be recovered against them, have been obtained by collusion, or founded in fraud, not only is authorized, but required, to take all proper and necessary means to open and reverse the same, and to use the name of the mayor, aldermen and commonalty, and to employ counsel for that purpose.

The first question which arose in my mind when this motion was commenced before me was, whether a judgment could be opened on an application made by the comptroller, pursuant to this statute, when no collusion or fraud has been directly and affirmatively shown, but, nevertheless, palpable error in the proceedings and palpable inadvertence and misconception of duty on the part of the defendants' counsel.

The comptroller swears that the action is unfounded and fraudulent, and this belief, whether afterwards substantiated by direct proof or not, is a sufficient justification to him for *instituting* the proceeding. For this he is responsible to no one: If he, sincerely entertaining the *belief*, brings the case before the court, and on the motion circumstances are disclosed, not

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amounting to collusion or fraud, except such fraud as may be inferred from the manner in which the reference was obtained—not amounting even to intentional breach of duty in any respect on the part of defendants' counsel, but to gross error and mistake, by which a judgment for a large amount has been rendered against the defendants, and the time for remedying the error by appeal has been allowed to elapse, is it not the duty of the court, now that the case has been properly and legally brought before it, to give the defendants an opportunity of being again heard and effectively defended? Undoubtedly, judgments, as I said on a former occasion, not dissimilar to this, should not hastily, or for slight causes, be set aside; but, where the mistake is manifest, and where, through the inadvertence of counsel, or any other cause, which the defendant himself does not directly sanction, the administration of justice can never be hindered or embarrassed by opening the judgment, and giving the defendant an opportunity of being heard before the suitable tribunal. There are many reasons which satisfy me, that the judgment in this action should be opened; at this time and place, it is not necessary that I should enumerate, or even indicate, all of them. It is sufficient to mention one.

This is an action for representations by the defendants' agents, in relation to the extent of a right, which afterwards proved to be false, to the great alleged damage of the plaintiff.

A motion was made by the plaintiff's counsel for a reference, upon an affidavit stating that the trial of the action would occupy a *long time*, and that a number of separate and distinct *facts* would have to be proved by a large number of witnesses. The notice contained the name of the person whom the plaintiff wished to be appointed referee, requiring that the whole of the issues in the cause should be heard and determined by him. This motion, it appeared from the order, was opposed by the counsel of the corporation; whether he actually attended to contest it, so that the judge was made aware of an earnest and real opposition, I am not informed; but it is quite certain that

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he did not consent in writing, so that the order, to all intents and purposes, was a compulsory reference. Now, although, by section 270 of the Code, all or any issues in an action, whether of fact or law, or both, may be referred upon the written consent of the parties, section 271 provides that no reference can be *compulsorily* ordered, that is without the consent of both parties, except the trial shall require the examination of a *long account*; in which case the referee may be directed to hear and decide the whole issue, and except where the taking of an account shall be necessary for the information of the court before judgment, or for carrying the judgment into effect. The order of reference in this action could have been granted only under the first subdivision of the latter section (271); that is, on the ground that the trial required the examination of a long account.

But no such pretence is set forth in the affidavit on which the application is founded; it only states that a number of separate and distinct facts will have to be proved by a large number of different witnesses. Nor does it appear, from the pleadings, that the examination of a long account, in the legitimate sense of an *account*, could be involved. The plaintiff, indeed, states by way of aggravation of damages, that he was obliged to expend large sums of money, and to contract to pay large sums of money; but this could not constitute an account against the defendants—so as to bring it within the policy of the law, which compels, in actions growing out of certain dealings based upon an express or implied contract between the parties to an action, or their representatives, a departure from the ordinary method of trial in common law actions. No account of this description can be necessary in an action of tort or sounding in tort; indeed, if this were permitted, that provision of the constitution, declaring "the trial by jury, in all cases in which it has been heretofore used, shall be inviolate for ever," could be always evaded. This is a constitutional right which cannot be too faithfully preserved; and any legislative provision tampering with it should, at the least, be very strictly construed. Compulsory references should be rigorous

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ly confined to cases involving the examination of a *bona fide* account in an action of contract, and should also be literally and truly a long account.

I, therefore, think that the court, which granted the order of reference, most manifestly exceeded its power, and, as I believe, from some misapprehension, committed a grave error. It would not, perhaps, be proper for me, sitting at special term, to review the action of another judge also at the special term; even in cases of this description, where the order is voidable. But here is a statute calling upon the courts to interpose, as if in an emergency, and requiring a certain officer different from the head of the law department of the corporation, to make the application in questions of vital importance, in which the interests of nearly a million of persons are concerned; we find undoubted and flagrant error, forcing the trial of a difficult and complicated cause before a tribunal, in contravention of the constitution, and no effort made to rectify the wrong by appeal. Shall I, under such circumstances, hesitate to afford to the defendants such a trial as they are constitutionally entitled to? I am confident, if the judge who granted the order of reference, heard the motion which I am now about to decide, and recalled the circumstances under which it was granted, that he would be the first to revoke his own order, and set aside the judgment founded upon it.

As I have already intimated, it is unnecessary to consider the other objections to the manner in which this judgment was obtained. The order of reference alone would be fatal to it.

The judgment must be set aside, and the order of reference revoked.

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SUPREME COURT.

JOSEPH WHITEHEAD agt. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Section 427 of the Code reads in this way: "An action against a corporation created by, or under the laws of any other state, government or country, may be brought in the supreme court, the superior court of the city of New-York, or the court of common pleas for the city and county of New-York, in the following cases:

- "1. By a resident of this state, for any cause of action.
- "2. By a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state."

The question is, where an *attachment* is issued against a foreign corporation upon their property here, by a *non-resident plaintiff*, in an action for alleged damages arising from a breach of contract made out of this state, the attachment can be sustained on the ground that "*the subject of the action*" is within this state?

Held, that "the subject of the action," in such case, is *the claim therein asserted* by the plaintiff, and the *satisfaction* of which he seeks out of the property. The *property* itself is not the subject of the action; the court, therefore, have no jurisdiction in such case. The attachment consequently discharged. (*This is a new and important question and decision.*—*REP.*)

It seems, that a statute of this state (*Session Laws of 1858, ch. 121*), which authorizes a railway company, created by the laws of and located in Canada, to take and hold real estate, for the purpose of making a railway in this state, and for that purpose makes applicable to it the sections of the general railroad act relating to acquiring title to real estate, and declaring it to be a *corporation* under the general railroad act, as if organized under the same, and to possess the privileges and franchises, and be subject to the duties as if organized under the same, if constitutional, does not give authority to proceed against said company only as against a *foreign corporation*.

Erie General Term, November, 1859.

*Present, GREENE, P. J., MARVIN, GROVER and DAVIS,
Justices.*

APPEAL from an order granting a motion to set aside an attachment granted against the defendant as a foreign corporation.

The defendant was incorporated by act of the Canadian Par-

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liament, June 16th, 1856, and its two *termini* fixed by the act, viz.: Goderich and *Fort Erie*. At the time of incorporation all the corporators were foreigners, and at no time since has there been any officer, agent or managing power resident or citizen of this state, with the single exception of one director for a short time. By act of the New-York legislature (*Chap. 360, Laws of 1847, Vol. I of Laws, p. 752*), the defendants are authorized to take and hold real estate, for the purpose of making a railway from the river shore through the city of Buffalo, &c., and for that purpose the sections of the general railroad act relating to acquiring title to real estate are made applicable to this corporation. By act of the legislature of New-York, passed April 7th, 1858 (*Chap. 121, Laws of 1858*), "The Buffalo and Lake Huron Railway Company" is declared to be a corporation under the general railroad act, as if organized under the same and to possess the privileges and franchises, and be subject to the duties, as if organized under the same.

F. J. FITHIAN, *for plaintiff, argued,*

First. Assuming the defendant to be a foreign corporation, then the attachment should stand. The affidavit upon which it issues is sufficient. (*Code, section 229; Howard's N. Y. Code, p. 344; Morgan agt. Avery, 7 Barb. 656; Matter of Griswold, 13 Barb. 412.*)

The next question is, whether the defendant is a corporation created by and under "the laws of any other state or country," within the meaning of section 227 of the Code, and on that question we say—

First. It is submitted that this corporation is within the provisions of the Code, section 227, and subsequent sections; and that an attachment can issue against its property, even though the New-York act (*Laws 1858, chap. 121*) should have all the effect claimed for it by the defendant's counsel.

1st. The statute gives an attachment in all cases where the defendant in the action is "a corporation CREATED by or under the laws of any other state government or country." (*Code,*

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section 227.) This language, when read in connection with section 229 of the Code, must be considered as a definition of what is meant by the term "foreign corporation," as in the latter section.

2d. Conceding to the New-York act the effect claimed for it by the defendant's counsel, still the corporation is left within the plain letter of the statute authorizing an attachment. Conceding (at this point) that it is *possible* for the legislature to enact impossibilities, and give to this corporation some sort of a domicile or status in this state; still, is it not true, nevertheless, that this corporation was **CREATED** by the laws of Canada? If it existed at the time of the passage of the New-York act, by the same name, with the same privileges and franchises, and under the same officers and direction, and all this by the laws of Canada, has it ceased so to exist by any act of New-York? Will the counsel contend that the corporation is any the less a body "created" by the laws of Canada now, than it was when the New-York act was passed?

Second. But it is contended that the act of the New-York legislature (*Laws of 1858, chapter 121*) is absolutely null and void, and of no effect whatever.

1st. How is this act to be construed? If it be claimed that it was intended to have the effect of making this corporation a body corporate of the state of New-York, without destroying its identity as a corporation by the laws of Canada, and leaving it the same corporation there and here—then the legislature has undertaken a moral and physical *impossibility*. A corporation is a legal entity, a creature of *positive law*. It cannot migrate, and this because it is an artificial creature of the law of the place or government where it exists, and every hour of its existence is by force of that *law*, and when the corporators attempt to move themselves or it beyond the jurisdiction of the law and government under which they were created and exist, the privileges and franchises they hold under *that law* must **FALL FROM THEM**; and the converse of the proposition is equally true, that so long as a body corporate continues to have a legal existence and identity under the government and

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laws of our country, that same body politic or corporate cannot by *possibility* have a legal existence and identity by virtue of the laws of any other government or country. It is as impossible as for the same man to exist in the United States and Canada at the same time, or that the same man should be twice born, or begotten by two fathers.

It is conceded that the legislature of this state may confer privileges and franchises upon a foreign *corporation*, but these are only privileges to the foreigner, and in no respect changes his character or identity. And should it be contended that *that* only is what was intended by the act, then I answer that there is no provision in the act exempting this foreign corporation from attachment.

2d. Will the counsel contend that, by virtue of his New-York act, he has got two corporations—one in Canada by the laws there, and one here by the laws of the state of New-York? This is equally impossible with the other. A corporation is one *personage in law*: it is indivisible; it is impossible that a set of corporators, with a corporate *name*, and with privileges, franchises, directors, officers and managers, should be two corporations, with the same *privileges, franchises, corporate name, officers and managers*, at the same time, and in different places and jurisdiction. This would be to endow them with ubiquity. The Siamese twins were closely connected, but one was "Chang" and the other was "Eng;" they were not both the same person. We accept the doctrine of "Trinity," by faith, agreeing at the same time that it is beyond the comprehension of finite reason, but we cannot be asked to accept the Lake Huron Railway by faith; it must stand in our courts, if at all, by law and reason.

3d. The act of New-York is impossible of execution in another respect. It provides that this corporation, naming it and recognizing its *previous existence* as a body corporate, shall be a corporation under our general railroad act, as if formed under that act, &c., and possess all the privileges, and be subject to all the liabilities granted and imposed by that act. Now it is impossible that the provisions of the general railroad act

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should apply to this corporation. They are utterly inconsistent. The courts cannot execute the act. Every section would come in conflict with the rights of the corporators and corporation under the Canada law. How is the court to execute upon this company the provisions of our act as to the stock management of the road, elections of the officers, individual liability of the stockholders, lien of laborers, &c.? It is impossible.

The next inquiry is, whether the plaintiff, who it is conceded is a non-resident of this state, is for that reason debarred from maintaining this action. It is conceded plaintiff is not a resident of this state. It is claimed defendant is a foreign corporation. It is admitted the "*cause of action*" did not arise in this state. It is shown by the papers that the defendant has *property* within this state. And it is insisted that *such property* is the *subject of the action* within the meaning of section 427 of the Code, sub. 2. The court below decided to the contrary, and on that ground set aside the attachment. We maintain the court erred,

1st. It is conceded that, at common law, no action lay in our courts against a foreign corporation, either in *personam* or in *rem*.

2d. The Revised Statutes (2 *R. S.*, part 3, chapter 8, title 4, § 15) authorized an action or suit against a foreign corporation to be brought by *attachment*, in behalf of "a resident of this state." Of course such a suit was *necessarily* a proceeding in *rem* against the property. It could not be in *personam*, unless there was a voluntary appearance. And under this statute the writ of attachment was the *process* by which the suit was commenced.

3d. Then came the Code of 1848, providing for the commencement of all suits by summons, or summons and complaint, abolishing all writs or process whereby actions had been before commenced, and giving an order of attachment as a proceeding in the action, or a "provisional remedy," but containing no provision for actions against "foreign corporations.

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4th. The Code, therefore, did in no respect change the *nature* of actions against "foreign corporations" from being suits in *rem*. (4 *How. P. R.* 276.)

5th. In 1849 (*Laws, chapter 107, p. 142*), the legislature enacted that suits might be commenced against *foreign* corporations, by "complaint and summons, together with an attachment as now provided by law," upon all contracts executed and delivered within this state, and for all causes of action arising within this state. This act was not limited to *residents* of this state.

6th. Then follows the Code of April 11th, 1849, with the 427th section as it now stands, giving an action against a foreign corporation by a *resident* of the state, for "any cause of action." And by a *non-resident* when the "cause of action shall have arisen, or the subject of the action be *situated* within this state."

We maintain, therefore, that in all actions against *foreign* corporations, when the object and purpose of the action is to enforce payment of a debt or demand out of the property of such corporation in this state, by virtue of attachment and judgment, the *subject* of the action is the *property* sought to be *sequestered*.

1st. It is decided by every court which has spoken on the subject, that such an action is a proceeding in *rem*, and not in *personam*. (4 *How. P. R.* 275; 13 *How.* 516; 5 *How.* 183.)

This proposition is fully conceded by the judge at special term.

2d. This last proposition ought to be decisive of the case. If it be a proceeding in *rem*, what other *subject* can there be for the suit to affect but the *property*?

3d. The learned judge, at special term, holds that the subject of the action is the *claim* asserted by plaintiff, and "the satisfaction of which he seeks out of the property attached which he concedes to belong to defendant." With respect it is submitted, this is confounding the "subject" with the "cause" of action. Every action may be said to have three elements. The *cause*—the *object* and *purpose*—and the *subject*. Express

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mention is made of *two* of these elements in the section of the Code under consideration. In this case, what is plaintiff's *cause* of action? What brings him into court? It is that there is a contract and a breach, for which plaintiff claims compensation in damages. If the word "claim" be used in the sense of the plaintiff's demand, as it sometimes is, then it is equivalent to the "cause of action," or the contract and breach. If it be meant to signify by it merely the prayer for relief, or the asking the aid of the court, then it has no legal significance whatever in the question at issue. But in no sense can it be said to be the "subject of the action." The cause of action and claim exists, and belongs to the plaintiff before any suit, and without any interference by the court. It is *that* which sets the court in motion. The "object" of the proceedings in court—the end sought to be obtained is to *subject* the *person* or *property* or both, of the defendant, to answer plaintiff's claim. The "subject" *upon* which the court acts is the person or *property* of the defendant. In this case it is not the *person* of the defendant. That is beyond the reach of the court, and cannot be brought within its jurisdiction, unless by voluntary appearance. But the *property* of the defendant is within the power of the court, and is the only matter or thing which *can* be *subjected* to the plaintiff's claim. If this was an action of *replevin* for personal property, or *ejectment* for real estate, can there be a doubt that the property sought to be reached would be the "subject of the action?" Yet in both such cases personal judgment could be rendered against the defendant. Certainly, then, in a proceeding *wholly* in *rem*, what can be the subject of the action but the *rem*? (*Ready* agt. *Stewart*, 1 *Code R. N. S.* 298.)

4th. The foregoing is sustained by authority. One of the definitions of the word "subject" is "to cause to undergo, as to subject a substance to a white heat," &c., so the "subject" is that on which any "mental" or "physical" operation is performed. In logic it is that concerning which anything is affirmed or denied. (*Webster's Dictionary*.)

So in the case of *Clark* agt. *The New-Jersey Steam Naviga-*

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tion Co. (1 *Story's Circuit Court Reports*, 531). This was a libel filed in the district court of Rhode Island, and an attachment issued thereon against the property of defendants in that district. Plea that defendants were a corporation of *New-Jersey*, and that they could not be sued or their property attached in the courts of any other district or state. Judge STORY decided that although an action in *personam* could not be sustained against a foreign corporation (unless it voluntarily appear), yet as to property of such corporation within the jurisdiction, an action would lie to reach it, in which case the proceeding was in *rem*, and the property the subject of the action.

It is claimed *Ready* agt. *Stewart* (1 *Code, R. N. S.* 297) is in point for us. It was there held, where both parties were residents of *Maryland*, and the causes of action arose there, that the plaintiff could maintain an action against the defendant here by an attachment of his property here. And that because—although the court got no jurisdiction of the person of the defendant, it had jurisdiction over all property in this state—and in such cases, the property and not the person was the subject matter of the action. The language of the judge is too plain to be mistaken on this point. So in *Brewster* agt. *Michigan Central Railroad Company* (5 *Howard*, 183), the court set aside a personal judgment against a foreign corporation, by service upon an agent in this state. WELLES, J., says, "The extent of power of the court over a foreign corporation, where there has not been a voluntary appearance in the action, is to subject the property and effects of such corporation within this state to the payment of its debts, by a judgment in *rem* as to such property and effects after the same has been attached," &c. If the purpose and the power of the court is solely to "subject" property, what can be the "subject of the action" but the property sought to be subjected?

Again, the alterations which have been made in sections 113 and 114 of the Code of 1848 (now sections 134 and 135) should have much weight in giving a construction to section 427. The first Code of 1848 contained no provision whatever for suing

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a foreign corporation, or for publication of a summons in *such case*. (See sections 113, 114.) Then came the Code of 1849, adding section 427—changing sections 113 and 114 to 134 and 135, and amending section 135, so that service of summons might be made by publication in cases “*where the defendant is a foreign corporation.*” Then came the decision of SILL, J., in *4th Howard P. R.* 276, holding that service of summons upon an agent of a foreign corporation here was of no effect, and that no judgment in *personam* could be obtained against a foreign corporation without a voluntary appearance. Of course, under such an adjudication, the provisions for making service of a summons by publication, upon a foreign corporation, was of no avail. But in order that the proceeding in *rem* against the property of the corporation might not fail for want of some way to serve a summons (which was the only way provided for commencing any action whatever), the amendments of 1851 provided for service in *such case only* on a foreign corporation. To the first subdivision of section 134 they added the words, “*but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein;*” and to the first subdivision of section 135 they added these words, “*and has property within this state, or the cause of action arose therein;*” thus providing for the commencement of actions in the two cases mentioned in subdivision 2 of section 427, and showing conclusively that the legislature which made these amendments understood the term, “*subject if the action shall be situated within this state,*” as used in section 427, to mean precisely the same as the words, “*property within this state,*” used in sections 134 and 135.

The learned judge, at special term, answers this by saying that, “this construction would create a direct repugnancy between the sections in question.” With respect, we submit the “repugnancy” is created by the construction which the *court* gives to section 427. Let that section have the construction we contend for, and there is no repugnancy, but all the sections would harmonize, not only with each other, but with the manifest understanding of the legislature.

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The case of *Bank of Commerce agt. The Rutland, &c., Railroad* (10 How. P. R. 1) is no authority against us. That case turned upon the other clause of section 427, and the question was, whether the *cause of action* did or did not arise within this state; and the suit being upon a bill of exchange payable here, the court held, that the cause of action arose here, and for that reason held the proceedings valid. It is true that Justice HAND did remark, in passing, that the property was *not* the subject of the suit. But that point was not up at all, or discussed by counsel. The remark was *dictum*—unnecessary for the decision of the case, and it is clear the judge had given it no examination; for in the same sentence he uses the words, "subject *matter* of the action," thus interpolating a word not in the statute, and which gives to the word "subject" a much broader signification than it would have without such word.

To the point, that a suit against a foreign corporation, and an attachment against its property, is a proceeding *in rem*. (See 13 *Howard's Practice Rep.* 516, and all other authorities therein cited.)

Lastly. If it be claimed that the act of the New-York legislature (*chapter 121, Laws 1858*) had the effect to create or organize a new corporation within this state, then we contend it is in conflict with the constitution, and void.

Section 1st, article 8th, of the constitution, provides that "corporations shall *not* be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporation cannot be obtained under general laws."

1st. This is a special act

2d. It is not a municipal corporation.

3d. The object to be attained by this corporation is to construct, own and operate a railroad, and hold sufficient real and personal property for that purpose.

4th. That these objects can be obtained by general laws, has been adjudged by the legislature by at least a dozen acts; and the same thing was fully adjudged by the act in question,

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by its attempts to make this a corporation under the general act.

WM. W. MANN, *for defendants, argued,*

I. The order discharging the order of attachment in this action should be sustained, because :

1. The defendant is a corporation under the laws of the state of New-York, to authorize the formation of railroad companies and regulate the same, passed April 2d, 1850. (*Vide Session Laws 1858, chapter 121, p. 226.*)

2. The act of 1858, declaring the defendant a corporation under the general railroad law of 1850, is valid, and not a violation of the first section of article 8th of the constitution of the state of New-York. (*Morris agt. The People, 3d Denio, 382, opinion, p. 394; Suydam agt. Moore, 8 Barb. S. C. Rep. 358, opinion, 364; Syracuse City Bank agt. Davis, 16 Barb. S. C. 188 and 193; 15 do. 657-663.*)

I. If, in the opinion of the court, the defendant is a foreign corporation and liable to attachment, then we say the plaintiff has not made out a case.

By section 229 of the Code, an attachment may issue in favor of any person, when it shall appear that the defendant is a foreign corporation, and that a cause of action exists.

By the affidavit upon which the order of attachment was made, it does not appear that a cause of action in favor of plaintiff against defendant exists. The plaintiff swears defendant is indebted to him for work, &c., \$160,000. It does not appear that the debt, if any, was due or when it became due. It specified the amount of the claim, but does not specify the grounds of the claim.

II. Section 427 of the Code, relative to actions against foreign corporations, provides that actions may be maintained :

1st. By a resident of the state, for any cause of action.

2d. By a plaintiff not resident when the cause of action shall have arisen in this state, or the subject of the action shall be situated within the state.

The affidavit upon which the order of attachment was made

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is defective, in that it shows the defendant to be a foreign corporation, but does not show that the plaintiff is a resident of this state, or that the cause of action arose here, or the subject of the action is situated here.

The remedy by attachment under the Code is a provisional one, and, unless the plaintiff can maintain his action, no attachment can issue or be maintained.

The defendant's affidavits show, that the plaintiff is a non-resident, and that the cause of action, if any, arose in Canada.

By the court—GREENE, P. J. The only question, which I deem it necessary to decide on this motion is, whether, conceding the defendant to be a foreign corporation, it is liable to be sued, or rather to be proceeded against under our statutes, which provide for the *appropriation by judicial proceedings of the property* of such corporations situated in this state, to the payment of their debts. There are a few elementary propositions material in the consideration of this question, which need only to be stated.

First. No valid judgment *in personam*, or which, *proprio vigore*, creates or declares an obligation to pay money or perform any legal obligation, can be pronounced by any judicial tribunal, until it has first obtained jurisdiction over the party against whom the judgment is pronounced by the ordinary process of the common law, or in the equivalent language of our state and federal constitutions, "*by due process of law.*"

Second. A corporation can have no local habitation beyond the territorial bounds of the government, by whose laws it was created, and hence no jurisdiction *in invitum* of it, a *quasi corporation*, can be obtained in a country, subject to any other government. But,

Thirdly. All property within the jurisdiction of any government is necessarily subject to the control of its laws, and may rightfully be appropriated by those laws to the payment of the debts of its owner, at such times and upon such conditions as may, by such government, in the exercise of a reason-

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able discretion, be deemed just. And as this right, as well as the manner of exercising it, depends upon the laws of the country where the property is situated, it must be exercised in all respects in subjection to those laws. The true points of inquiry, therefore, are: to what extent do the laws of this state subject foreign corporations to proceedings in its courts for that purpose, and by whom and for what causes may such proceedings be instituted?

Prior to the adoption of the Code, the Revised Statutes provided that suits brought in the supreme court, by a resident of this state, against any corporation created by the laws of any other state, &c., for the recovery of any debt or damages, might be commenced by attachment. (2 R. S. 457, 157.) Until the enactment of this statute, it seems to have been conceded, that under our laws no proceedings could be taken against foreign corporations, except in cases where they appeared voluntarily, or in other words, that our courts had no common law jurisdiction over such corporations, and could acquire none without their consent. (See *opinion of SILL, J., in Hulbert agt. The Hope Mutual Ins. Co.*, 4 How. P. R. 276; *Matter of McQueen and others agt. The Middletown Manufacturing Co.*, 16 John. R. 5, and 1 R. S., p. 163, § 23, § 21, p. 162, and § 1, p. 157.) In the case last cited, it was held, that the provisions of the act under which the case arose applied to *natural persons* only. (*Opinion of SPENCER, J., pages 6 and 7.*) The Code as first enacted (*Laws of 1848, chap. 379, p. 497*) contained no provision for the commencement of "actions" against foreign corporations. By an act passed March 15th, 1849 (*Laws, ch. 107, p. 142*), the 15th section of the Revised Statutes, above cited, was amended, so as to provide that *suits* might be brought in the supreme court and court of common pleas, in the city of New-York, against any corporation created by the laws of any other state, &c., for the recovery of any debt, &c., arising upon contract made, executed and delivered within this state, or upon any cause of action arising therein, that such suits might be commenced by complaint and summons, together with an attachment as then provided by law, and that such

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complaint and summons might be served in the manner provided by sections 113 and 114 of the Code of Procedure. By a subsequent act passed April 11th, 1849 (*Laws, chap. 488, p. 613*), the Code was revised and amended, "so as to read," as provided by the latter act. By this act, several new sections were added to the Code, among them were sections 227 to 243 inclusive, and section 427. By the latter section it was provided that an action against a corporation created by the laws of any other state, &c., might be brought in the supreme court, the superior court, or court of common pleas of the city of New-York, in the following cases:

1st. By a resident of the state, "*for any cause of action.*"

2d. By a plaintiff not a resident of this state, when the cause of action shall have arisen, *or the subject of the action shall be situated within this state.*

This section has remained unchanged until the present time. Section 227 provided that, in an action for the recovery of money, an attachment might be issued as a security for the satisfaction of such judgment as the plaintiff might recover, among other cases, where the action was against a corporation created by the laws of any other state, &c.

The following sections to 243, inclusive, prescribe the proceedings upon such attachment. These sections, with the exception of certain amendments to sections 227, 229 and 241, which in no way affect the question under consideration, remain as they were originally enacted. Sections 134 and 135, in the act of 1849, which are substituted for sections 113 and 114, in the Code of 1848, and which contain amendments, which need not be here noticed, prescribe the manner of serving the summons in all cases.

By act passed July 10th, 1851 (*Session Laws of 1851*), the Code was again amended. By that act sections 134 and 135 were amended in the following particulars, supposed to be material to the question under consideration:

By the first subdivision of section 134 of the Code, as amended in 1849, as by the same subdivision of the corre-

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sponding section (113) of the Code of 1848, it was provided that if the suit was against "*a corporation*," the summons should be served by delivering a copy thereof to the president or other head of the corporation, secretary, cashier or managing agent thereof. By the amendment of 1851, the following clause was added to the first subdivision of section 184:

"But such service can be made in respect to a *foreign corporation* only, when it has property within this state, or the cause of action arose therein."

Section 135 of the Code, as amended in 1849, provided, that when the person, upon whom the service was to be made, could not be found in the state, the court or a judge might grant an order, that the service be made by the publication of the summons among other cases, "when the defendant is a foreign corporation." By the amendment of 1851, it was provided that service by publication might be made "when the defendant is a foreign corporation, and has property within the state, or the cause of action arose therein."

It is conceded that this action is not brought "by a resident of this state, nor upon a contract made, executed or delivered within this state."

It follows, therefore, that neither the provisions of the Revised Statutes above cited (2 *R. S.* 459, § 15), nor the amendment of that section adopted in 1849 (*Laws of 1849, ch. 107, p. 142*), have any application to this case, and if this proceeding can be sustained at all, the authority for it must be found in the provisions of the Code. The provisions of section 427 have been quoted, and they seem to me decisive of this question. That the courts of this state have no common law jurisdiction over or power to render judgments in *personam* against foreign corporations is clear, both upon principle and authority. (*See the cases above cited, and Brewster agt. The Michigan Central Railroad Co., 5 How. P. R. 183.*) The proceeding against a foreign corporation, though termed an "action" against it, is merely a proceeding in *rem*, or a *quasi* proceeding in *rem*, the object and sole effect of which are to appropriate its property, within the jurisdiction of the court, to the payment of the

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debts of the corporation. That proceeding can be instituted only by the persons and for the causes prescribed by the statutes of the state. (*Case agt. Ohio Insurance Co.*, 2 C. R. 82.) The section last cited provides that this proceeding or "action" may be instituted by a resident of this state, for any cause of action, and by a plaintiff not a resident, when the cause of action *shall have arisen, or the subject of the action* shall be situated within this state. We have seen that the plaintiff is not "a resident of this state." It is admitted by the affidavits on both sides, that the contract, upon which the action is brought, was executed, and that the breach of it, for which the damages are claimed, took place in Canada. There can, therefore, be no pretence that the cause of action "arose in this state." I think it is equally clear that "the subject of the action" was not situated within this state. What is the subject of the action? Not certainly the title to the property attached, for the plaintiff asserts no such title here; he claims the right to have that property appropriated to the payment of an alleged debt due to him from the defendant. But this right is neither questioned nor questionable, if his right to maintain this proceeding is conceded. The subject of the action is the *claim therein asserted* by him, and the satisfaction of which he seeks out of the property attached, which he concedes to belong to the defendant. (*See the opinion of HAND, J., in the case of The Bank of Commerce agt. The Rutland and Washington Railroad Co.*, 10 How. P. R. 8.) On the argument, the plaintiff referred to the case of *Ready agt. Stewart* (1 C. R. N. S. 298), as sustaining the position in question.

But I do not so understand the opinion of the learned judge who delivered the opinion in that case. He says the term, "subject of the action," relates to the nature of the action, or the "*thing*" sought to be obtained by the judgment to be given, but not at all to the "*person of the defendant*." The learned judge was commenting upon the 3d subdivision of section 135 of the Code, which requires that, in the case of a non-resident defendant, who has property in the state, and the action arises on contract, the court should have juris-

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diction of the *subject* of the action. Now, the thing sought to be obtained by the judgment was, the establishment of the claim asserted in the action. The idea that the learned judge was combatting was, as I understand his language, simply that the term, "jurisdiction of the subject of the action," did not mean jurisdiction of the defendant.

It was also urged on the argument, on the authority, I suppose, of a suggestion of Justice HAND, in the case above cited, that the amendment of sections 134 and 135, limiting the service of summons, as in those sections prescribed, to cases where the cause of action arose in the state, or the defendant had property therein, is to be construed as modifying section 427, so as to make a foreign corporation liable to an action, whenever it has property in the state. This construction would create a direct repugnancy between the sections in question. This consequence should, and I think may be avoided by limiting the provisions of each section to the apparent object of the section. Section 427 specified the cases in which actions might be brought against foreign corporations, and sections 134 and 135 prescribed the manner of serving the summons in certain classes of cases, without regard to the right to maintain the action in any particular case. The object of these sections, I apprehend, was to provide for a service in all cases, where, assuming the right to institute an action, such service would be of any utility to the party; and while it may be difficult in all cases, and especially in cases like that now under consideration, to perceive a perfect adaptation of all the provisions of these sections to this object, I think it would be still more difficult to give them the effect of enlarging the provisions of another section in which the right to maintain this class of actions is plainly defined, and as plainly limited. In short, the authority to maintain these actions is given by section 427, and the practice in them, so far as the service of the summons is concerned, is regulated by sections 134 and 135, and this, I think, is the only effect of these sections in such cases.

It is settled by well-considered authorities, that proof of

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jurisdictional facts is not essential to establish the regularity of the service of a summons upon a foreign corporation. The attachment may be issued at the time of issuing the summons, or "at any time afterwards." (*Hulbert agt. The Hope Mutual Insurance Company, above cited, and Bates agt. The New-Orleans, Jackson and Great Northern Railroad Co., 13 H. P. R. 516.*) The corporations proceeded against by summons before the issuing of an attachment may, on motion, contest these facts, and the plaintiff may, on a motion to set aside the service of the summons, produce the proof necessary to show his right to proceed against the corporation and thus sustain his proceedings. (*Cases above cited.*)

It is not until the plaintiff procures his attachment, which is to operate upon the property of the corporation, and which effects and eventually consummates the whole object of the proceeding, that the plaintiff is bound to prove the acts upon which jurisdiction to entertain the proceedings depends.

As the plaintiff in this case was not a resident of the state, and as the cause of action did not arise, and the subject of it is not situated within this state, it follows that the court has no jurisdiction of the proceeding.

And the order to discharge the attachment must be affirmed with \$10 costs.

MARVIN, GROVER and DAVIS, Justices, concurring.

SUPREME COURT.

ATKINSON agt. COLLINS.

Where, in an action for work and labor, there is a *special contract* between the parties, if not completed or executed, as to its terms, the plaintiff should state it, or refer to it in his complaint; if he does not, the defendant has a right to set it up, and urge it in his defence.

Whether, under the Code, where the *special contract* is *executed*, the plaintiff may declare *generally* for whatever is alleged to be due for the work, labor and services, without any reference to the contract, as under the former system of pleading, *quære?*

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New-York General Term, Nov., 1859.

By the court—CLERKE, Justice. This action was brought to recover for work and labor performed by plaintiff for defendant, in painting ward school No. 34, in the city of New-York. The defendant had made a contract with the school officers of the 13th ward, to furnish and provide all the carpenter's work and materials for the erection and completion of four wings, and other alterations inside of the main building of said school, including painting and other work; and it was in consequence of this contract that the defendant employed the plaintiff as a sub-contractor for a portion of the work.

The defence set up that the work was done under a special contract, and that the work had never been accepted by the superintendent of the school buildings, or by the school officers of the ward.

There was a claim for extra work, for which the jury rendered a verdict; but, for the work referred to in the contract between plaintiff and defendant, nothing was allowed—the judge deciding that the only question of fact he should submit to the jury was as to the extra work.

The general rule is, that evidence of services performed under a special agreement will not maintain a general count for work, labor, and services; but where the terms of a special agreement are consummated—in other words, where it is what the law calls *executed*—an obligation arises, for which what was formerly known as a general indebitatus, assumpsit will lie—that is, where the contract is executed, it would not have been necessary to declare specially on the contract, but the plaintiff may declare generally, for whatever was alleged to be due for the work, labor, and services, without any reference to the contract.

Whether this rule applies now—whether, even if the terms of the contract are completed, the plaintiff can allege a general demand, without any reference to the contract, is very questionable. The Code, which is generally deemed to have relaxed the rules of pleading, requires, in many instances, a

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strictness unknown to pleading in its degenerate days—its provision neutralized by the “general issue,” and the other laxities, existing at the time of the introduction of the Code. For example, the Code (§ 142) requires that the complaint shall contain a plain and concise statement of the facts constituting a cause of action. Now, where there is an agreement to perform certain work, whether the terms of that agreement have been completed or not, it would seem that the agreement is one of the essential facts, constituting the cause of action, and should, it may with great plausibility be urged, be contained, in all cases, in the complaint. But it is, probably, unnecessary to discuss this question at present. We shall consider this case as if the Code had not introduced a rule stricter than that which prevailed under the old system.

If, then, there was a special contract between the plaintiff and defendant, and if it was not completed or executed as to its terms, the plaintiff, according to the rule under that system, ought to have stated it, or referred to it in his complaint, and not having done so, the defendant had a right to set it up, and to urge it in his defence. It is not denied that a special contract had been duly executed between the plaintiff and defendant, and that it provided, when the graining was done, the plaintiff should receive \$165 (one-half), and when the whole was completed, and accepted by the superintendent of school buildings, and the school officers of the 13th ward, the plaintiff should receive the remaining \$165.

It was very important to the defendant that the agreement should contain this provision or condition, because his agreement with the school officers contained one precisely identical; so that, until the superintendent of school buildings and the school officers accepted the work, the defendant would not be in funds to pay his sub-contractors. The evidence clearly shows, that the work performed by the plaintiff for the defendant never was accepted by those authorities, and that, consequently, the terms of the agreement were not completed or executed. The plaintiff, then, was properly nonsuited as to the work comprised within the contract—the judge having

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refused to submit any question in relation to that work to the jury, on the ground that the complaint did not refer to it.

If, indeed, the complaint alleged the contract, there might have been a question of fact for the jury; and that question would be, did the superintendent of school buildings and the school officers accept the work?

But, under the pleadings in the action, the judge was right in not submitting that question to them, and, in effect, dismissing the complaint, as to the work under the contract. The judgment should be affirmed, with costs.

UNITED STATES CIRCUIT COURT.

ALBERT E. SHAW agt. THOMAS COLLIER.

Where, in an action *in personam*, the court below ascertained, from the hearing before it, that the main questions in controversy were in respect to accounts between the parties as master and owner of a vessel—held, that it was a proper case to be referred to a commissioner; it was not necessary that the testimony should be taken in open court.

As a general rule, where the court below make a decree upon matters of fact depending upon a conflict of evidence, the appellate court will not disturb it.

September Term, 1859.

THE libel in this case was filed by the libelant as master of the steamboat *George Law*, against the owner, the respondent, *in personam*, to recover wages for the years 1854 and 1855.

BEEBE, DEAN & DONOHUE, for libelant.

D. & T. MCMAHON, for respondent.

NELSON, C. J. The court below, on the cause being called, heard evidence sufficient to show that the libelant had been in the employ of the respondent as master of the vessel, and that the principal question was as to the amount due for the

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service, if any, and thereupon referred it to a commissioner to take the proofs as to the nature, extent, and value of the service, and as to the payments or other deductions to be made, if any, and report thereon. The case was heard accordingly before the commissioner, and a balance reported in favor of the libelant of \$334.74, which report was subsequently confirmed by the court, and a decree entered for that amount against the respondent.

It is now objected that the court erred in referring the cause to the commissioner instead of taking the testimony in open court. But we cannot conceive any foundation for this objection. The court had ascertained, from the hearing before it, that the main questions in controversy were in respect to accounts between the parties as master and owner of the vessel, and very proper, therefore, to be referred to and heard by a commissioner.

The rights of the respondent were not prejudiced, as the whole case could afterwards be presented to the court upon the proofs and exceptions to the commissioner's report, and much of the valuable time of the court was thus saved by the reference.

It has also been objected that the court had no jurisdiction of the case, as a portion of the service, claimed in the year 1854, was upon a vessel engaged in the purely internal business and commerce of the state. But it is a sufficient answer to say, that this objection has no application to the service in the year 1855, and the balance of wages decreed, after deducting the payments, is less than the amount of the wages for that year.

A great deal of testimony has been taken as to the service on the vessel, whether as master or clerk, and as to the competency of the libelant as master, the value of the service, &c. But these are matters of fact depending upon a conflict of evidence, which we shall not enter into. We are satisfied with the conclusion arrived at by the court below.

Decree affirmed.

SUPREME COURT.

WINTHROP P. BLAKE agt. JOSEPH ELDRED and others.

Section 160 of the Code was intended as a substitute for exceptions for impertinence, as allowed under the former chancery practice. A *whole pleading* was never struck out for impertinence, nor will a whole answer or defence be stricken out for *redundancy*. The word "pleading," in § 160, is synonymous with "answer" or "defence."

The rule is, that if an *answer*, a *separate denial*, or *defence*, otherwise good, is loaded with unnecessary or redundant matter, a motion should be made to have the matter expunged under § 160.

If either of such *pleadings* contain *new matter*, not redundant, and doubts are entertained of its sufficiency in law, it may be tested by *demurrer*.

If the *whole answer* be *frivolous*, application for judgment under § 247 is the proper remedy.

If an *answer*, *denial*, or *separate defence*, is false or irrelevant, the only remedy is a motion to strike out under § 152.

Where *every part* of an *answer* is objected to as irrelevant and redundant, although by *several exceptions*, it must be regarded as an exception to the *whole pleading*, and an application to strike out under § 160, as to each exception, cannot be entertained, because it would give to the motion the effect of a demurrer, or a decision under § 152.

A party, seeking to have matter expunged, must specify the parts deemed irrelevant or redundant. The court cannot be required to examine the whole pleading, and select the parts to be removed.

Where the notice of motion, under § 160, contains the *general prayer for relief*, the motion may be made under § 152, which will reach the whole answer, denial, or separate defence, although verified.

Where the defendant merely "*says* that he denies," &c., it is a *sham defence*; it is no denial, but a negative pregnant. The Code requires a *direct and positive* denial.

A general and specific denial is not permitted to the *same parts* of a complaint; but an answer may contain a *specific denial* to one part of a complaint, and a *general denial* to the remainder.

Thus, where the defendant, to certain parts of the complaint, designating them, interposes a specific denial absolutely, and of his own knowledge, and then interposes a general denial, on information and belief, of every other allegation in the complaint, the two denials do not conflict, and both are consistent with the Code.

But where the defendant answers on information and belief, and then denies all the allegations in the complaint "*inconsistent with the facts*" alleged, and

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stated in the answer, it is insufficient. *Answering* on information and belief is not *denying* on information and belief. The Code requires the denial to be "of any knowledge or information sufficient to form a belief."

Franklin Special Term, April, 1858.

MOTION to strike out the whole of an answer as irrelevant, redundant, and immaterial.

The action was for the specific performance of an agreement for the sale of real estate. The separate answer of Eldred contained a specific denial, a general denial, and six separate defences; the two latter—the six years and the ten years' statute of limitations. The notice of motion divided the application into eight specifications, each being to the whole of a denial or answer, and all to the whole pleading.

J. HUTTON, *for plaintiff.*

J. R. FLANDERS, *for defendant.*

JAMES, Justice. By the Code, all forms of pleading theretofore existing were abolished, and now the forms of pleadings in civil actions, in courts of record, and the rules by which the sufficiency of pleadings are to be determined, are those prescribed by that act (§ 140). The answer of a defendant must contain—1st. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2d. A statement of any new matter constituting a defence, in ordinary and concise language, without repetition (§ 149). A plaintiff may demur to an answer containing new matter, when, upon its face, it does not constitute a defence (§ 153). Sham and irrelevant answers and defences may be stricken out on motion, &c. (§ 152). If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby (§ 160). If an answer be frivolous, the party prejudiced thereby may apply to a judge, either in or out of court, for judgment thereon, and judgment may be given accordingly (§ 247). These are the

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rules prescribed by the Code, and which must govern the court on this motion.

It will be observed that a demurrer does not now lie to an answer, unless it contain new matter, and only to such new matter, or a part thereof. Before the amendment of 1857 to § 153 of the Code, a demurrer for insufficiency was allowed. Then a defective denial could be reached by such plea, now it cannot. If the whole answer, or if the whole of any one of several separate denials or defences in an answer, be sham, or irrelevant, it may be reached by motion under § 152. If the answer, denial, or defence contain irrelevant or redundant matter, it must be reached by motion under § 160.

Under the decision of this court, in *Arthur agt. Brooks* (14 Barb. 538), the first denial is insufficient. It contains no denial. The defendant merely "*says that he denies,*" &c. That is but a negative pregnant. The Code requires a direct and positive denial. Such defect cannot now be demurred to as formerly. It can only be reached by motion to strike out the denial under § 152, which may be done notwithstanding the answer is verified. (*Reed agt. Latson*, 15 Bar. 9 & 17.) If such a defective answer cover the whole pleading, application to the court, or a judge, for judgment, might be made under § 247; but where the answer contains other defences than the one complained of, the defect cannot be reached under that section. (*Quin agt. Chambers*, 1 Duer, 673.)

This application was under § 160. That section was intended as a substitute for exceptions for impertinence, as allowed under the former chancery practice. A whole pleading was never struck out for impertinence, nor will a whole answer or defence be stricken out for redundancy. The word "pleading," in § 160, is synonymous with "answer" or "defence."

The rule which governs these cases is this: if an answer, a separate denial, or defence, otherwise good, be loaded with unnecessary or redundant matter, a motion should be made to have the matter expunged under § 160: if either of such pleadings contain new matter, not redundant, and doubts are

entertained of its sufficiency in law, it may be tested by demurrer: if the whole answer be frivolous, application for judgment, under § 247, is the proper remedy: and if an answer, denial, or separate defence, be false or irrelevant, the only remedy is a motion to strike out, under § 152. (*Nichols agt. Jones*, 6 *How.* 358.)

No part of this motion can be granted under § 160. Each application is to strike out the whole of a denial or defence, and all include the whole pleading. If the word "pleading," in § 160, was not to be construed as synonymous with "answer" or "defence," it could make no difference with this case; because, where every part of an answer is objected to, as irrelevant and redundant, although by several exceptions, it must be regarded as an exception to the whole pleading. The court cannot speculate whether any one or more of the denials or defences will be sustained. If all that is asked for was granted, no answer would remain; that would give to a motion to strike out redundant matter the effect of a demurrer, or a decision under § 152. (6 *How.* 352-5; 8 *id.* 150.)

Nor can the plaintiff, under his notice of motion in this case, have a portion of any one or more of the denials stricken out, even though they contain irrelevant or redundant matter. A party seeking to have matter expunged must specify the parts deemed irrelevant or redundant. The court cannot be required to examine the whole pleading, and select the parts to be removed. It is enough that the court decide the question when the objectionable matter is specifically pointed out. (6 *How.* 353; 4 *id.* 68.)

The notice for this motion, however, contains the general prayer for relief, and may therefore be considered as if made under § 152. A motion under that section reaches the whole answer, denial, or separate defence, as the case may be. The objection to the first denial is fatal. As I have already before shown, it is no denial—it is a sham, and must be stricken out.

The second denial is objected to "as irrelevant and redundant; that a defendant cannot deny the allegations of a complaint on information and belief; nor can there be both a

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general and specific denial to the same answer." If this denial contained redundant matter, it could not be reached on this motion. A general and specific denial is not permitted to the same parts of a complaint; still, an answer may contain a specific denial to one part of a complaint, and a general denial to the remainder. In this case, to certain parts of the complaint, designating them, the defendant interposes a specific denial, absolutely and of his own knowledge: he then interposes a general denial—intended, no doubt, to be on information and belief—of every other allegation in the complaint. I do not think the two denials conflict—and both are consistent with the Code, and may be included in the same answer in denial of the complaint.

But I am inclined to think this second denial a sham. It answers on information and belief, and then denies all the allegations in the complaint "inconsistent with the *facts*" alleged and stated in the answer. Code, § 149, requires the defendant to deny the material allegations of the complaint absolutely, or of any knowledge or information sufficient to form a belief. Answering on information and belief is not denying on information and belief; and if it were, it would not aid the pleading, because such a denial is not authorized by the Code. It should be a denial "of any knowledge or information sufficient to form a belief." Neither is a denial of all the allegations of the complaint, inconsistent with the *facts* stated in the answer, sufficient. The court cannot know which of the allegations and statements in the answer are *facts*, or whether any facts are stated. This denial is therefore defective, and must be stricken out.

Neither of the other defences stated in the answer are false, sham, or irrelevant, and, therefore, not one of them can be stricken out. Several of them contain irrelevant and redundant matter, which might be reached by motion, on proper notice, under § 160.

In granting a motion under § 152, it may be upon such terms as the court may in its discretion impose. The denials in this case are both struck out, but with leave to the defend-

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ant to serve an amended denial, or denials which, together with the several defences in the present pleading, shall stand as the answer of the defendant.

The motion to strike out the several defences in the answer is denied.

Neither party to have costs.

SUPREME COURT.

THE PEOPLE, &C., *ex rel.* THE BANK OF THE COMMONWEALTH,
agt. THE COMMISSIONERS OF ASSESSMENTS AND TAXES IN
THE CITY OF NEW-YORK.

The *capital stock* of banking incorporations in this state, which is invested in *stocks of the United States*, is liable to *taxation*.

New-York, Special Term, July, 1859.

THIS case was argued in May last, on a *mandamus* proceeding against the defendants, to compel them to deduct the sum of \$103,000 from a taxable capital of \$750,000 levied upon their capital stock. The plaintiffs claimed that the said sum of \$103,000 was a portion of their capital stock invested in stocks of the United States, and was therefore exempt from taxation under the constitution. The tax commissioners held to the contrary, and refused to abate the tax. The question is one of great importance, as a large portion of capital invested in banking in this city is represented by United States stocks.

A. W. BRADFORD, *for plaintiffs.*

R. F. ANDREWS, *for defendants.*

SUTHERLAND, Justice. After a good deal of consideration, I am of the opinion that the commissioners of assessments, in

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determining the amount for which the relators should be assessed, did right, after deducting from \$750,000, the amount of their capital stock paid in, or secured to be paid in, the sum of \$188,834.84, paid for their real estate, in refusing to deduct the further sum of \$103,000, the portion of their capital stock invested in stocks of the United States.

The question has been somewhat complicated by the amendments in 1853 and 1857 to Title 4, Chap. 13, of Part 1st of the Revised Statutes (1 *Rev. Stat.* 414); but I think, notwithstanding these amendments, the commissioners did right in refusing to make the deduction.

There is no doubt that, by the provisions of this title, as they were before these amendments, the relators were liable to taxation on the amount of their capital stock *paid in, or secured to be paid in*, after deducting the sums paid for real estate, and the amount of their stock, if any, belonging to the state, or to incorporated literary and charitable institutions, irrespective of its investment at all, or, if invested, irrespective of the manner of its investment, and of its accumulations or losses or value. (1 *Rev. Stat.* 414, title 4, §§ 1, 2, 6, 10; *The People agt. The Supervisors of Niagara*, 4 *Hill*, 22; *Bank of Utica agt. City of Utica*, 4 *Paige*, 399.)

Under the provisions of the Revised Statutes, before the act of 1857, the relators were liable to be taxed on the nominal amount of their stock itself, paid, or secured to be paid in, and not upon its value.

By the act of 1853 (*Laws of 1853, Chap. 654*), they were liable to be taxed, not only upon the nominal amount of the stock paid in, or secured to be paid in, but also upon the amount of all surplus profits, or reserved funds, exceeding ten per cent. of their capital, after deducting the amount paid for their real estate, and the amount of their stock, if any, belonging to the state, &c.

By the Laws of 1857 (*Vol. 2, Chap. 456*), "the capital stock of every company liable to taxation, except such part of it as shall have been excepted on the assessment roll, or shall have been exempted by law, together with its surplus profits or re-

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served funds, exceeding ten per cent. of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations, actually owned by such company, which are taxable upon their capital stock under the laws of the state, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county."

I am aware that a very strong argument can be made, for such an argument was made by the counsel for the relators in this case, to show that to hold in this case, under the provisions of the Revised Statutes as thus amended, that the relators are liable to taxation on their capital stock to be assessed *at its actual value* without reference to its investment or to what it is invested in, would be an evasion of the constitution of the United States, and of the decisions of the federal court under it, and a sacrifice of substance to form; but without undertaking to answer this argument at large, I will say, that sometimes words are things; and as the legislature have chosen to say that the capital stock of the company paid in, or secured to be paid in, shall be taxed, at its actual value, on the shareholders, irrespective of the mode or manner of its investment, I am not willing to circumscribe state sovereignty by holding that they had not power to say so.

The capital stock of the company is taxable as a distinct thing from the stock which it holds in other companies.

The holders of its shares might have been taxed for their shares; but these shareholders are not taxed as such, and the company is to be taxed for all the shares except those belonging to the state, &c. It is the shares of its own stock which are taxable at their actual value, and not the shares which the company owns of the stock of other companies, or of the public stocks of the United States.

The assessment complained of in this case by the Bank of the Commonwealth was not on United States stock held by the bank, but on its own stock as a distinct thing, and as such having a known and distinct value.

In the case of *Norton agt. City of Charleston*, in the supreme

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court of the United States (2 *Peters*, 449), the tax was imposed on the United States stock, "*eo nomine*."

In *McCulloch* agt. *State of Maryland* (4 *Wheat*, 436), it was held, that the interest, which a citizen held in the Bank of the United States, was taxable by the state. In the case of the *British Commercial Insurance Co.* agt. *The Commissioners of Taxes* (17 *Howard* 206; *S. C.* 28 *Barb.* 318), the stock deposited with the comptroller did not consist of shares of the company's own capital stock, but was a distinct fund or deposit of stock.

Upon the whole, I am of the opinion that the relators are bound to pay the tax as assessed by the commissioners, and that the proceedings of the commissioners should be affirmed, with costs.

SUPREME COURT.

HYATT agt. WAGENRIGHT.

An *affidavit* for an order for the publication of the summons must show the residence of the defendant, or that it is neither known to the plaintiff, nor can with reasonable diligence be ascertained by him.

And the order must state that a copy of the summons and complaint be forthwith deposited in the post-office, directed, &c. An order which merely states that "a copy of the summons and complaint be deposited in the post-office addressed to the defendant," is defective and insufficient.

At Chambers, Binghamton, Dec. 10, 1859.

APPLICATION for an order for the publication of the summons.

HENRY WELCH, *for plaintiff*.

BALCOM, Justice. The Code requires that the order for the publication of the summons "must direct a copy of the sum-

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mons and complaint to be *forthwith* deposited in the post-office, directed to the person, to be served at *his place of residence*, unless it appear that *such residence* is neither *known* to the party making the application, nor can *with reasonable diligence be ascertained by him*." (§ 185, *sub. 5*.) The affidavits in this case do not show the *residence* of the defendant, or that it is neither *known* to the plaintiff, nor can *with reasonable diligence be ascertained by him*. Which facts they must show before I can grant the order applied for. The order presented is printed; but it is defective, as many that have been printed are. It states that a copy of the summons and complaint be deposited in the post-office, addressed to the defendant, and that is all. It should read that a copy be *forthwith* deposited, &c., for that is the language of the Code (§ 185, *sub. 5*); and it should also state that it be directed to the defendant, at his residence, *naming it*, if it is known.

For the foregoing reasons, I must return the papers in this case to the plaintiff's attorney, without granting the order applied for.

NEW-YORK COMMON PLEAS.

CHARLES J. McDONALD agt. CORNELIUS A. GARRISON AND
CHARLES MORGAN.

On an order for the examination of a witness *conditionally*, the statute does not require that the *judge* should write down the examination of the witness *himself*; or, in case he does not, that he make an order to show cause why the testimony should not be taken before a *referee*.

He may employ an *amanuensis* to write down the testimony, and by seeing that every answer or declaration of the witness required by either party is included in it; in reading it over to the witness; in seeing that he duly subscribes it; in administering the proper oath or affirmation to the witness, of the truth of the answers given by him, and included in the deposition; and adding his own certificate that the above requirements have been complied with, is a taking of the deposition within the design and intent of the statute.

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General Term, July, 1859.

APPEAL from an order at special term denving a motion to suppress a deposition.

JOHN T. DOYLE, *for plaintiff.*

I. T. WILLIAMS, *for defendants.*

By the court—DALY, F. J. The statute declares that the judge shall take the deposition; that it shall be carefully read to, and subscribed by, the witness, and that it shall be certified by the officer taking the same. The amendment of 1851 further provides that, when an application is made for an order for the examination of the witness conditionally, the officer, instead of directing the examination to be had before him, may make an order requiring the adverse party to show cause why the examination should not be taken by a referee to be appointed by the officer. In this case the order was made for the examination of the witness before me, at chambers, upon a day named, at which time the parties appeared, and the adverse party insisted that I should write down the examination of the witness myself, or else that I should appoint a referee to take the testimony. To have written down the testimony would have obliged me to have devoted myself for several days to the matter, to the total exclusion of all the other chamber and special term business, a large amount of which arises in this court each day, that must be immediately and at once disposed of; and not having in the first instance made an order for the defendant to show cause why the testimony of the witness should not be taken by a referee, but an order requiring the adverse party to appear before me, and attend the examination of the witness, I did not feel called upon, when the parties and the witness were before me upon a proper order, to delay the examination of the witness by then making an order to show cause why the examination should not be taken by a referee, even if an order to that effect could then have been properly made; and I accordingly directed that the examination should be conducted according

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to the practice that has prevailed in this court since the statute was enacted, which practice, as a judicial interpretation of the statute, has been sanctioned and approved by the judges of this court for a period now of thirty years. After, therefore, administering an oath to the witness to the effect that he would well and truly answer all such questions as should be put to him, I ordered that the direct examination of the witness should be written down by the plaintiff's attorney, and the cross-examination by the defendant's attorney; or that, if the parties preferred it, I would appoint the deputy clerk of the court, or any other person they might select, to act as my amanuensis, and write down the testimony; but the defendants' attorney expressing no preference, but confining his objection to the point that I must write down the testimony myself, or else appoint a referee to take it, I directed it to be written down in the manner above stated, and declared, that if any difference occurred in the course of the examination, either as to the propriety of the questions put, or as to the answers to be written down, or as to any inaccuracy in the writing down of any question or answer that the parties should refer to me; and that, when the direct and cross-examination was fully written down, I would carefully read the deposition of the witness before it was subscribed by him, and certified by me, as the officer taking it. The examination of the witness was accordingly so conducted—the counsel for the parties respectively writing down both question and answer. The examination lasted several days, and when completed was carefully read over to the witness. The counsel for the plaintiff called upon the defendants' counsel to state whether he made any objection that the evidence was not correctly and fairly written down; but defendants' counsel put his objection solely upon the ground that the deposition had not been written down by the judge, or by a judge of the court, or ordered to be taken before a referee. The deposition was then carefully read to the witness, and duly certified, after which the defendant made a motion before Judge HILTON to suppress the deposition for the reason above stated, which

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motion was denied, and from which decision the defendant now appeals.

The statute makes no provision as to the mode in which the deposition is to be taken, other than it is to be taken by the officer, carefully read to the witness, subscribed by him, and certified by the officer taking the same. In no other respect does it enact how he shall take it, and reference must, therefore, be had to the practice which prevailed before the statute was passed, to ascertain the mode that was then in use; for if, in this respect, the statute is silent, the practice which existed when the statute was enacted continues in force.

In *Wyche's Practice*, p. 144—the first book that appeared in this state (1794) upon the practice of the supreme court—there is a section devoted to the course of procedure upon the examination of witnesses about to go abroad, in which this passage occurs: "At the time appointed, to take the witnesses to the judge—and the answers must be wrote down *under his inspection and control*;" and in *Dunlap's Practice* (Vol. 1, p. 551), which was the book in general use when the Revised Statutes were enacted, of which this statute formed a part—for there was no statute before, except one to perpetuate the testimony of aged or infirm witnesses in actions affecting the title to land (1 *Rev. Laws*, 455)—the mode of procedure on the examination of witnesses *de bene esse* is thus laid down: "The parties may then respectively examine and cross-examine the witness in the presence of the judge, and *take down his answers in writing*. The examination being concluded, the witness signs the deposition, and the judge adds his jurat." These citations show that it was not the practice for the judge to write down the deposition, but that it was taken in his presence, and under his supervision and control; so that, if any question was raised, or any objection made, he might order or direct what should be done; and by reference to the English authorities upon the examination of witnesses *de bene esse*, it does not appear that any such practice ever existed as that of the judge writing down the testimony of the witness. (2 *Tidd's Pr.* 810, 9th ed.)

In England the witness is taken to the judge's chamber, and

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sworn by the judge. He is then taken before the judge's clerk, and examined upon interrogatories and cross-interrogatories previously prepared, as upon commissions, and the clerk writes down his answers, and is paid for his services by the attorneys, to whom he furnishes copies at so much per sheet, together with a fee for filing their interrogatories. (*Impey's Pr. of Com. Pl.* 370, 7th ed.; *id. King's Bench*, 330, 10th ed.) To the requirements of the former practice in this state, the statute added that the deposition should be carefully read to the witness, and the judge must certify that that has been done.

The words of the present statute are, that the judge shall proceed to the examination of the witness, and shall take his deposition, in which deposition shall be inserted any answer or declaration of such witness, which either of the parties shall require to be included therein. I do not understand the words, "shall take the deposition," as changing the former practice to the extent of requiring the judge actually to write down the deposition himself. He may take the deposition, in the sense of the statute, in seeing that every answer or declaration of the witness, required by either party, is included in it; in reading it over to the witness; in seeing that he duly subscribes it; in administering the proper oath or affirmation to the witness of the truth of the answers given by him, and included in the deposition, and adding his own certificate that the above requirements have been complied with. This, in my judgment, is a taking of the deposition within the design and intent of the statute.

To require the judge to write down the deposition would be, in many instances, to render the statute practically inoperative. Frequently a party has very short notice of the intended departure of a witness—sometimes but a day, sometimes but a very few hours—and unless the examination can be completed within a limited time it may involve the loss of the testimony of the witness, who may be away before the compulsory power with which the officer is clothed can be resorted to or made effectual to detain him. It is not unusual

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in this court for three of these examinations to be going on at the same time, which could not be done if the judge had to write down each deposition, unless the three judges of the court stopped the cases on trial, or argument, in which they might be engaged, to attend exclusively to this business, or unless the witnesses attending for examination waited until the judge holding chambers found time to write down each deposition, which, in the case of an examination like this, extending over several days, would be to the neglect or putting off, to the serious inconvenience of a great body of suitors, of the large amount of chamber and special term business, which comes up for disposition every day before the single judge who attends to this branch of the business of this court.

No object would be accomplished by the judge writing down the testimony. If the judge is to read it over to the witness, then it matters not in whose handwriting it is. It is the aim of the statute, that nothing shall be inserted except what the witness means and intends to swear to; and that end is fully attained if the judge reads over the deposition to the witness, who then knows, before he subscribes, whether his answers have been correctly taken down or not, and an opportunity is offered to make any correction before the judge finally certifies it as the deposition of the witness taken by him.

It is suggested, that if the judge cannot write down the deposition, he may order it to be taken by a referee; but it is to be remembered that this statute was in operation more than twenty years before this amendment was added; and the practice under the statute, at least in this court, was well settled long before 1851. I suppose that the object of this amendment was to provide for cases, especially in other parts of the state, where it might be difficult or impossible for the judge to attend before the departure of the witness, and supervise the taking of his deposition; or where the parties and witness were all residing in a distant part of the district from that where the judge, at the time, was engaged in the discharge of his duties, in which case the convenience of all parties would

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be greatly promoted by allowing the deposition to be taken by a referee; a state of things which could rarely arise in this city, where a judge is sitting every day in each of the courts, specially to attend to this kind of business. I cannot suppose that it was the design of this amendment to remedy an inconvenience arising from a duty assumed to be enjoined by the statute, that the judge must himself write down the deposition of the witness; but that if it had ever been supposed that the statute contained such a requisition, we should not have waited twenty years for an amendment to remedy the inconvenience.

The order should be affirmed.

NOTE.—“If the officer, to whom such application is made, shall be satisfied that the circumstances of the case require the examination of such witness, in order to attain justice between the parties, he shall make an order requiring the adverse party to appear before such officer, and attend the examination of such witness, at such time and place as shall be therein specified; which time shall not exceed twenty days from the date of such order, and shall be as much shorter as the exigency of the case may require, and the residence of the adverse party, or his attorney, will allow, in order to afford sufficient opportunity to attend such examination; or may, in his discretion, make an order requiring the adverse party to show cause, on a day in such order to be named, why such testimony should not be taken by a referee to be appointed by him; and in such order shall direct the time and mode of service thereof upon the adverse party; such officer shall have power, upon proof of the due service thereof, if no sufficient cause be shown against the same, to appoint a referee to take such testimony, who shall take, certify, and file the same in the same manner, and with the like effect, as is provided in this article for the examination of such witness by a judge of the court.” (3 R. S., 5th ed., 673, § 3; *Howard's Code*, 613.)

“If no sufficient cause be shown, upon due proof of the service of such order, and a copy of the affidavit upon which the same was granted, the officer granting the same shall proceed to the examination of such witness, and shall take his deposition; in which deposition shall be inserted any answer or declaration of such witness which either of the parties shall require to be included therein.” (3 R. S., 5th ed., 674, § 5; *id.*, 614.)

This statute seems to require the *examination* of the witness to be taken *before the judge*, although he employs an amanuensis to write down the deposition. That is, although the respective attorneys may put the questions on the direct and cross-examination of the witness, “any answer or declaration of such witness, which either of the parties shall require to be included” in the deposition, shall be inserted therein by the judge (or his clerk). The *presence and control of the judge* during the examination seem to be indispensable.

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If the judge, during the examination, is allowed to be absent therefrom, attending to other business, and his amanuensis is attending to the examination in his stead, a *referee* is also authorized to do the same thing; for the statute requires the testimony to be taken before the referee *in the same manner* as by a judge; such a course would be carrying the practice of substitution in these cases to an extent which, probably, the legislature never contemplated. Some light may be thrown upon this question by reference to the following statute:

"On and after the first Monday of July next, the testimony of any competent witness may be taken in this state, to be used in any civil suit or proceeding, on an agreement in writing to that effect being made between the parties, their attorneys or solicitors, and on interrogatories to be agreed upon in the same manner. Said testimony may be taken before a judge of any court of record of this state, or local officer elected to discharge the duties of county judge, or a justice of the peace of this state, who shall, before the interrogatories are put to him, publicly administer an oath to the witness, that the answers given to said interrogatories shall be the truth, the whole truth, and nothing but the truth; *and the testimony shall be truly and carefully reduced to writing by the officer, and read to the witness and subscribed by him, and certified by the officer.* The testimony so taken, together with the interrogatories, shall be filed with the clerk of the court in which the suit or proceeding shall be pending; and, if in the supreme court, and taken in a suit or proceeding at law, the same shall be filed with the clerk of the county in which the suit or proceeding shall be pending; and if before any court or officer having no clerk, then with said court or officer. And said testimony may be used in evidence on any trial or hearing of such suit or proceeding, and every objection to the competency or credibility of said witness, or to the competency and relevancy of any answer given by him, may be made in the same manner, and with the like effect, as if such witness were personally examined at such trial or hearing. (*Laws of 1847, p. 344, § 78.*)

SUPREME COURT.

JOHN WARDEN, respondent, agt. GEORGE C. BUELL, appellant.

Where, in an action for the *foreclosure of a mortgage*, the mortgagor and his grantee of the premises are made defendants—the latter only answering—the mortgagor is not a competent witness for the grantee, under section 397 of the Code, to prove *usury* in the bond and mortgage.

Because, under that section, the defendants would be jointly interested in such a defence, and a separate judgment thereon could not be rendered, the basis of the action being a single contract—the bond and mortgage.

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Whether the mortgagor might not be a competent witness on that question in his own behalf, under section 399—*quære?*

Monroe General Term, March, 1859.

T. R. STRONG, WELLES and E. DARWIN SMITH, *Justices.*

APPEAL from a judgment.

G. F. DANFORTH and S. MATHEWS, *for appellant.*

J. L. ANGLE, *for respondent.*

By the court—T. R. STRONG, Justice. Flanders executed a bond, together with a mortgage on real estate; and afterwards conveyed the mortgaged premises to Buell. This action is for a foreclosure of the mortgage, and a judgment against Flanders for any deficiency there may be after a sale of the premises. Buell has answered, setting up as a second defence the defence of usury. Flanders has not answered. On the trial of the issues, Flanders was called by Buell as a witness, to prove the usury, and he was rejected upon an objection by the plaintiff, to his competency to prove that defence.

It is claimed, on the part of Buell, that Flanders was a competent witness under section 397 of the Code. That section provides, that "a party may be examined on behalf of his plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered." We think Flanders was not a competent witness under that section. He could not give any testimony to establish the usury, which would not benefit him equally with Buell. If that defence should be sustained, the action would be defeated as to him as well as to Buell. No judgment could be entered against him, although he did not answer, if Buell prevailed on that defence. The case is not, therefore, one in which separate judgments could be rendered as to Flanders and Buell, in respect to the matter of that defence; and it is a case in which a joint judgment could be rendered in their favor as to that matter. In our opinion, they were, therefore, jointly interested or liable, so far as that de-

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fence is concerned, within the meaning of the section in question.

There is a wide and important difference between this case and the case of an action under the statute of 1832, as amended, or section 120 of the Code, against the makers and indorsers of a bill of exchange or promissory note. In the latter case, the action is upon several distinct and independent contracts. The defence of one party cannot be of any avail to another. The drawer, or any indorser, may defeat the action as to him for usury, and yet any other separate party be held liable on his own contract. In the present case, the basis of the action is the bond and mortgage, a single contract, and if they are adjudged invalid for usury, the action as to all is subverted.

We do not consider whether Flanders might not have been a competent witness in his own behalf, under section 399 of the Code, on the issue between Buell and the plaintiff. If he would have been he should have been offered as such, that the plaintiff might, if the fact was so, object to the want of the requisite notice to him of the examination.

The judgment must be affirmed with costs.

SUPREME COURT.

AMASA S. FOSTER agt. WM. R. PRINCE, and others.

Where execution was issued to the county of Queens, where the judgment-debtors resided, and returned unsatisfied,

Held, that a justice of this court in the city and county of New-York had *jurisdiction*, under section 294 of the Code, to make an order compelling a debtor to the judgment debtors, residing in the city of New-York, on examination, to apply the property of the judgment-debtors in his hands or make payment of the debt to the judgment-creditor upon his judgment. (*See* 12 *How.* 136; *id.* 359; 4 *Sand.* 640.)

New-York General Term, June, 1859.

APPEAL from an order in supplementary proceedings.

Foster agt. Prince.

By the court—ROOSEVELT, Justice. Foster, the plaintiff, having obtained a judgment against the Messrs. Prince, residing at Flushing, in Queens county, upon which an execution to that county had afterward been returned unsatisfied, took steps to compel the application of a balance standing to the credit of one of the defendants, in the Fulton Bank of New-York, to the satisfaction of the demand.

On the 22d of November, one of the judges of this court accordingly made an order requiring the cashier of the bank to appear before him in this city, to be examined concerning the alleged balance of the defendant, and enjoining the bank in the mean while from parting with, or otherwise disposing of the fund. Upon the examination, on the 30th of the same month, another order was made directing the bank to pay over the balance to the judgment-creditor.

The defendants, the judgment-debtors, now contend that this order was a nullity; that as they resided in Queens county, although the bank was in New-York, the judge in the first district had no jurisdiction. No objection is made on the part of the bank. All that the bank requires is protection against any double demand. And as to the judgment-debtors, the point raised by them, it will be seen, is merely technical; for no man can doubt the justice of compelling a debtor, residing in Queens, to pay his debts out of a balance of his credit in bank, even though the banking house should be in New-York.

The question raised turns on the true interpretation of the Code, the 292d and 294th sections of which provide that, in a case like the present, the judgment-creditor is entitled to an order from "*a judge of the court*," compelling the debtor to appear and answer before him within the county where the debtor resides, touching his property, and also to an order requiring any debtor to the judgment-debtor to appear and answer at a specified time and place, concerning such debt. The judgment-debtor is to appear in the particular county, but the debtor to the judgment-debtor is to appear "*at a specified place*;" meaning, of course, a place to be specified by the judge,

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who would naturally select a place, other things being equal, most convenient to the person to be examined, and not necessarily to the judgment-debtor. It is right to do so, and its fitness, also, is shown by the provision which dispenses with any attendance in such case, as matter of right or obligation, of the judgment-debtor on the examination of said third party. I allude to the clause in section 294, which declares that "the judge (meaning 'a judge of the court,' that is any judge of the supreme court), may also, *in his discretion*, require notice of such proceeding to be given to any *party to the action*, in such manner as may seem to him proper."

As, then, the party to the action has no absolute right to notice of the time and place of examining his debtor, he, of course, cannot except to the selection.

This view of the true meaning of the Code is further confirmed by the 293d section, which declares that, "after the issuing of execution against property, any person indebted to the judgment-debtor, may pay to the sheriff the amount of his debt, or so much as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid." No consent, it will be perceived, is required on the part of the judgment-debtor, nor any notice to enable him, if so disposed, to prevent the application of that, which is due *to* him from one person, to the payment of that which is due *by* him to another. If, then, his debtor, without his consent, may pay voluntarily, how can he complain that, his debtor, without his consent, has paid under the sanction of the judge?

As the defendants, whatever may be said in respect of the bank, are not aggrieved, they cannot complain, and their appeal, of course, should be dismissed.

Appeal dismissed with costs.

SUPREME COURT.

THOMAS H. SMITH and others agt. ROBERT HEERMANCE and others.

On an appeal from a judgment of the special term to the general term, the same *undertaking* is required in order to *stay proceedings*, as on an appeal from the general term to the court of appeals. (*Code*, §§ 334-338.)

By the 340th section, this undertaking, in order to operate as a *stay*, must be *filed and served with the notice of appeal*, not afterwards.

Where the proper *undertaking*, in form to stay proceedings on an appeal from a judgment of foreclosure at special term, was served and filed some time after the service of the notice of appeal, which was returned on the ground that it was not served in time, and was not in due form, and thereupon the defendant made a special motion to stay the proceedings, founded on such undertaking, which was denied on the ground that the motion was unnecessary, as the plaintiff's proceedings were already stayed by the undertaking, from the time of service, and the plaintiff thereupon proceeded and sold the premises,

Held, on a motion to confirm the report of sale, that under such a misapprehension at special term, of the effect of the undertaking, the sale be vacated upon terms, and the proceedings be stayed until the decision upon appeal.

Albany Special Term, February, 1859.

MOTION to confirm report of sale under judgment of foreclosure.

The action was brought to foreclose two mortgages. Judgment was rendered on the 27th of July, 1858. The amount due upon the mortgages was \$3,240.90. The costs were taxed at \$284.28. The judgment directed that the mortgaged premises be sold, and that these sums, with the interest, be paid out of the proceeds. On the 23d of August, the defendant, Robert Heermance, served upon the plaintiffs' attorney a notice of appeal to the general term. No order to stay proceedings or undertaking was served with the notice of appeal.

Subsequently, the plaintiffs' attorney caused the mortgaged premises to be advertised for sale. The sale was to take place on the 15th of November. On the 9th of November, the

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plaintiff's attorney received a copy undertaking from the attorney for the defendant Heermance, which he declined to receive. It was returned with the objection that it was served too late, and also on the ground of some objections to its form. The attorney for the defendant Heermance then gave notice of a motion founded upon the undertaking, to be made on the last Tuesday of November, for a stay of the proceedings upon the judgment, until the determination of the appeal. The sale was thereupon adjourned until the 4th of December. The motion to stay proceedings was denied, on the ground, as appears from a memorandum upon the papers made by the judge who held the special term, that, upon an appeal from a special term to the general term, an undertaking, if in due form, stays proceedings from the time of service, and that an order staying proceedings was, therefore, unnecessary.

The plaintiffs' attorney, still insisting that the undertaking, not being served with the notice of appeal, did not operate as a stay of proceedings, proceeded to sell the mortgaged premises on the 4th of December. Upon such sale the plaintiff became the purchaser, for the sum of \$3,000. The sheriff having made his report of the sale, this motion was made to confirm such report.

In opposition to the motion, the undertaking, which had been served in November, was produced, from which it appears that the appellant and two sureties, each of whom had justified in due form in the sum of \$1,500, had undertaken that the appellant would pay all costs and damages which might be awarded against him upon the appeal, not exceeding the sum of \$250, and that, during the possession of the premises by the appellant, he would not commit, or suffer to be committed, any waste thereon, and that, if the judgment be affirmed, the appellant would pay the value of the use and occupation of the premises from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment, not exceeding five hundred dollars, that sum having been fixed by a judge of the supreme court, pursuant to the 338th section of the Code. And further, that, in case of any deficiency arising

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upon a sale of the premises, the appellant would pay such deficiency.

The value of the premises sold, according to an affidavit produced on the part of the defendant, was about \$4,500.

W. C. BENTON, *for plaintiff.*

H. W. McCLELLAN, *for defendant.*

HARRIS, Justice. The regularity of the sale depends upon the question, whether the undertaking, executed as it was in November, operated to stay the proceedings upon the judgment from which an appeal had been taken in August. It is declared by the 348th section of the Code, that an appeal from a judgment, entered upon the direction of a single judge to the general term, does not stay the proceedings upon such judgment, unless security be given as upon an appeal to the court of appeals, or the court or a judge thereof shall so order. No such order was made. It is necessary, therefore, to inquire whether the appellant has, in this case, "given security as upon an appeal to the court of appeals."

In all cases upon an appeal to the court of appeals, security must be given in the manner prescribed by the 334th section of the Code, for the payment of costs and damages. In case of a judgment of foreclosure, if the appellant would have proceedings stayed, he must also give the security prescribed by the 338th section. The security required by these two sections may be united in the same undertaking.

In this case, therefore, the judgment being for the foreclosure of a mortgage, the undertaking to operate, as a stay of proceedings, must be conformable to the provisions of both the 334th and the 338th sections of the Code. In form it is thus conformable. But it is also declared by the 340th section, that a copy of such undertaking must be served on the adverse party with the notice of appeal. Under this section it has been held by the court of appeals, that an undertaking which is filed after the notice of appeal does not stay the proceedings. (*See New York Central Insurance Co. agt. Safford*, 10 Howard, 344;

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Mills agt. *Thursby*, 11 *How.* 139; *Crushman* agt. *Martin*, 13 *How.* 402.) It is clear, therefore, that had this appeal been from the judgment of a general term to the court of appeals, the security would not have been sufficient to stay the proceedings, for the reason that the undertaking was not filed and served in time. As the same security is required, in order to stay proceedings, upon a judgment rendered upon the direction of a single judge, when the appeal is to the general term, it seems to follow that the requirements of the 340th section of the Code are also applicable to such an appeal, and that, to render the appeal effectual as a stay of proceedings, a copy of the undertaking must be served with the notice of appeal. The plaintiffs' proceedings were, therefore, regular. The service of a copy of the undertaking, after the notice of appeal had been served, did not of itself operate to stay their proceedings.

And yet it appears that when the appellant, assuming that the plaintiffs' proceedings were not stayed, applied to the court for an order to that effect, as he was authorized to do by the 348th section of the Code, the court, misapprehending the effect of what the appellant had done, denied the application, solely upon the ground that it was unnecessary, the plaintiffs' proceedings being, as it was held, already stayed. It cannot be doubted, I think, that, but for this misapprehension, the plaintiffs' proceedings would have been stayed until the determination of the appeal.

Under these circumstances, the proper disposition of the matter is to vacate the sale, and to direct that, upon payment of the costs of all proceedings subsequent to the judgment, to be taxed by the clerk of Rensselaer, and the costs of this motion, and serving upon the plaintiffs' attorney a copy of the undertaking, which has been executed and filed, all further proceedings upon the judgment in this action be stayed until the determination of the appeal. An order will, therefore, be entered to this effect.

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HENRY LENX agt. A. JANSEN.

The defendant made and signed an order in these words: "Messrs. Foster & Lee, Gents: Pay to Joseph Lenx, or order, the sum of \$68.50, in such furniture as he may select, and charge the same to my account, for value received," and upon the back of this order Joseph Lenx wrote: "Pay to Henry Lenx," and signed his name thereto. The order was given for a *bona fide* indebtedness.

Held, that the order not being either a bill of exchange or promissory note, it was not transferable *at law* by indorsement merely; but in *equity* the indorsement invested the plaintiff with all the rights of Joseph Lenx, and entitled him to recover against the defendant.

General Term, July, 1859.

APPEAL from a judgment at special term.

By the court—BRADY, J. The defendant, being indebted to Joseph Lenx, gave him an order, of which the following is a copy:

"Messrs. Foster & Lee:

"GENTS—Pay to Joseph Lenx, or order, the sum of sixty-eight dollars and fifty cents, in such furniture as he may select, and charge the same to my account, for value received.

"June 26th, 1858.

A. JANSEN."

And it was agreed between them that it should not be presented until a day named, when the defendant was to meet Lenx, and go with him to the drawees. The defendant did not meet Lenx as promised, and Lenx thereupon wrote upon the back of the order: "Pay to Henry Lenx," and signed his name thereto. The assignee sued and recovered judgment. There is no evidence of the assignment of the claim, and no other assignment of the order, than the indorsement stated. It is conceded that this is not a bill of exchange, and it must be conceded that it is not a promissory

Lenx agt. Jansen.

note, although the respondent insisted, upon the argument, that it was a note payable in specific articles. The defendant makes no promise to pay anything by the order, either in money or articles. He requests Foster & Lee to pay Joseph Lenx the sum of sixty-eight dollars and fifty cents, in such furniture as he may select. It is, therefore, a request or direction to Foster & Lee to deliver to Joseph Lenx a certain amount of furniture, if selected by him, leaving a contingency as to selection. I have not been successful in finding a parallel case in the books, but the principles which apply to it are plain. The order not being either a bill of exchange or promissory note, it was not transferable at law by indorsement merely, and the plaintiff would take nothing by the alleged transfer from Joseph Lenx. It is otherwise in equity. When a subject, says Lord KAMES, is conveyed, every one of its accessories are understood to be conveyed with it, unless the contrary be expressed (1 *Kames' Principles of Equity*, 240), and when the instrument in suit was indorsed, that indorsement in equity operated as a transfer of all the accessories necessary to enable the plaintiff to recover. This doctrine has been illustrated by Judge DALY, in the case of *Sexton agt. Fleet*, decided at the present term of this court, and in his opinion the cases bearing upon the subject will be found. The indorsement of the order having invested the plaintiff with all the rights of Joseph Lenx, he was entitled, on the doctrine stated, to recover.

The judgment should be affirmed.

Lyon agt. Manly.

SUPREME COURT.

EDWARD D. LYON, respondent, agt. CHANDLER MANLY,
appellant.

A judgment rendered before a justice of the peace, after the filing and docketing of a transcript thereof in the county clerk's office, becomes a judgment of the county court; and, by § 71 of the Code, an action will not lie upon it without leave of the county court.

Where the *answer* in such an action sets up this objection specifically, the point will be considered sufficiently raised in the court below to sustain the appeal, without a more formal exception on the trial.

Monroe General Term, March, 1859.

T. R. STRONG, JOHNSON, and E. DARWIN SMITH, Justices.
APPEAL from a judgment.

H. R. SELDEN, *for appellant.*

H. J. THOMAS, *for respondent.*

By the court—T. R. STRONG, Justice. This action originated in a justice's court. The complaint sets forth the recovery of a judgment by the plaintiff against the defendant, in a court held before a justice of the peace in and for the county of Orleans, the filing of a transcript and the docketing thereof in the office of the clerk of said county, and demands a judgment for the amount due on the judgment so recovered, with interest. The answer is, among other things, that "the plaintiff cannot maintain an action upon the judgment set out in the complaint, for this reason—that, under the provisions of the Code, no action can be maintained on a judgment of the county court." On the day to which the trial of the cause was last adjourned, the parties appeared before the justice, and the defendant applied for a further adjournment, which was denied, when the plaintiff proved the judgment on which the action was brought, and the filing of a transcript, and then

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rested. No evidence was introduced, or question raised, by the defendant at the trial.

It is now made a point by the appellant, that the judgment which is the subject of the action, upon the filing and docketing the transcript, became a judgment of the county court, and therefore that, under § 71 of the Code, the action would not lie without proof that leave had been obtained from the county court to bring the action. That section provides, that "no action shall be brought upon a judgment rendered in any court of this state, except a court of justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party," &c.

The respondent insists that this point was not made in the court below, and that the appellant is, for that reason, precluded from making it here. We think the question is substantially presented by the answer. The answer is, in substance, that the judgment set forth in the complaint is a judgment of the county court, and that for that reason, under the provisions of the Code, the action would not lie. The only provisions of the Code, relating to the subject of actions on judgments, are those contained in § 71 referred to—so much of which as is applicable to this case is above recited. The plaintiff must have understood the answer to mean, that, under the first clause of that section, this action on the judgment would not lie, because the judgment was a judgment of the county court. The only obstacle to the action there could be under that section, taking that view of the judgment, was, that leave of the county court to bring the action had not been given, as in that section required. It was not claimed in the complaint that such leave had been obtained, and the answer obviously pointed, and must have been understood to refer, to that defect in the case. Undoubtedly, the objection might have been much more plainly expressed; but it was sufficient if, as we think it did, it called the attention of the plaintiff to the necessity of previous leave of the county court to warrant the action.

Upon the merits, we are satisfied that the position of the

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appellant, that the judgment was a judgment of the county court after the filing and docketing of the transcript, and that by § 71 of the Code an action would not lie upon it without leave of that court, is sound. When the judgment was rendered, and the transcript filed and docketed, § 56 of the Code of 1848 was in force, and provided, that "a justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket, and from that time the judgment shall have the same effect as a lien, and be enforced in the same manner as a judgment of the county court," &c. In 1849, the section was amended by striking out that part of the section relating to the effect of the judgment as a lien, and the manner of enforcing it, and substituting therefor the words, "shall be a judgment of the county court." (*See* § 63 of the *present Code*.) This change of phraseology does not, we think, change the substance of the provision so far as the question in this case is concerned. If the amendment had not been made, the case would be within § 71, and, if so, there can be no doubt of the validity of the amendment in reference to this judgment, if otherwise such doubt might be entertained. The new matter must be regarded as law only from the time it was introduced (*Ely agt. Holton*, 15 *N. Y. R.* 595); but if it is substantially the same as the old matter superseded by it, the power of the legislature to make the change, and that the provision as it stands is applicable to cases of judgments of which transcripts were filed and docketed before the change, as to those which are subsequent, is clear.

Ample provision was made by § 56 of the Code of 1848, as by § 73 of the Code in its present form, for enforcing justices' judgments, where transcripts were filed and docketed, in any county in the state; and every reason which existed for prohibiting actions on judgments of courts of record, without leave, applied to such justices' judgments. No

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action upon them, except in special cases could be necessary.

These views require a reversal of the judgment of the county court, and of the justice.

NEW-YORK COMMON PLEAS.

LINA LIPPMAN agt. SAMUEL PETERSBERGER.

The *time* within which a defendant must be charged in execution, before he can move for a *supersedeas* and a discharge from custody under the statute (3 R. S., 54th ed., 870), is to be computed from the time judgment is actually entered, not from the time the *offer* of judgment is made and accepted under the Code (Section 385.)

That is, the defendant is not to be charged in execution within three months after the term following that when the offer of judgment was *accepted*, but when it was actually entered up.

If the plaintiff neglect to enter the judgment within that time the defendant must apply for an order compelling him to do so.

Special Term, July, 1859.

MOTION by defendant for a *supersedeas* and discharge from custody.

B. F. SAWYER, *for the motion.*

A. J. DITTENHOEFER, *opposed.*

DALY, F. J. This motion is prematurely made. The defendant was arrested, and is still in custody, upon *mesne process*. After his arrest he made an offer under the 385th section of the Code, to allow the plaintiff to take judgment for a certain amount, which offer the plaintiff, on the 19th day of February last, accepted, but neglected to enter up the judgment until more than three months had elapsed—that is, he entered it up on the 30th of May, and on the day after issued

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execution against the property of the defendant, which has not yet been returned. The defendant now moves, under the 36th section of title 17, chap. 8, part 3 of the *Revised Statutes*, for a supersedeas, and that he be discharged from custody, upon the ground that more than three months after the last day of the term next following that at which judgment was obtained has elapsed, and that the plaintiff has not charged him in execution.

Three months have not elapsed since the actual entry of the judgment, but the defendant claims that judgment was obtained within the meaning of the statute when the plaintiff accepted the defendant's written offer, and that the defendant is not to suffer by the plaintiff's neglect to enter it up, but that he should have charged him in execution within three months after the term following that when the offer was accepted.

At the hearing of the motion, I was strongly impressed with the suggestion that the defendant should not suffer by the plaintiff's neglect; but to support the defendant's view it would be necessary to hold, in respect to the commencement of the time within which the defendant must be charged in execution, that it does not date from the entry or docketing of the judgment, but that the words, "at the time judgment shall be rendered or obtained," mean the time when the plaintiff is at liberty to enter up judgment. Proceedings of this kind are now unusual, and it will be necessary to look at the practice which prevailed before the *Revised Statutes*, for this provision is in this respect the same as that which was incorporated in the former act, for the relief of debtors, with respect to the imprisonment of their persons (1 *Rev. Laws of 1813*, 853, § 12), the practice under which appears to have been well settled. In 2 *Dunlap's Practice*, 827, it is said that the moving party must produce a certified copy of the docket of the judgment; and again, that if the "plaintiff, who is entitled to the judgment, should neglect or refuse to perfect it, the defendant must take measures to have judgment perfected against himself, and if not charged in execution within three months of the time of entering the judgment, he becomes suspendable."

And in *Kellett* agt. *North* (*Coleman's Cases*, 54), it was held, upon an application to compel the prevailing party to enter up judgment, that he should procure the roll to be signed and filed in four days, or that the other party should be at liberty to do it. The words, both in the Revised Statutes and in the act of 1813, are, that the defendant shall be charged in execution within the given time, after the judgment is obtained, and the practice under one is, therefore, equally applicable under the other. In a case like the present, the plaintiff, by section 385 of the Code, files the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk, therefore, enters judgment accordingly. It is from the judgment so entered, that the time within which the defendant must be charged in execution is to be computed. If the plaintiff neglect to enter it, the defendant, as in *Kellett* agt. *North*, must apply for an order compelling him to do so. The judgment was entered by the clerk on the 30th of May, and the time not having yet expired within which the plaintiff must charge the defendant in execution, the motion for a supersedeas must be denied.

SUPREME COURT.

HORACE WYMAN agt. MARY J. REMOND, administratrix, &c.

The defendant, within the time allowed to amend of course, under § 172 of the Code, may serve an *amended answer*, containing an entire *new and different defence* from that contained in the original answer.

The same principle applies in the amendment of complaints, as to *new causes of action*.

Albany Special Term, March, 1859.

MOTION to substitute new referee.

The action was commenced on the 16th of December, 1857, by the service of a summons and complaint. On the 23d of

Wyman agt. Remond.

January, 1858, and within the time allowed the defendant, by an order obtained for that purpose, an answer was served. The answer contained a counter-claim. On the 10th of February the plaintiff served a reply to the counter-claim. On the first of March the defendant served an amended answer. This answer did not contain the counter-claim, but set up the statute of limitations. The attorney for the plaintiff returned the amended answer, with a notice that he refused to receive it, on the ground that it contained a different and other defence from that contained in the original answer.

Upon this state of the pleadings the cause was noticed for trial, and at the January circuit, 1859, was, by the consent of both parties, referred to a sole referee.

Upon the trial before the referee, the plaintiff's counsel insisted that the issue was that made by the original answer and the reply thereto; and the defendant's counsel insisted that the issue was that made by the amended answer. The referee declined to decide the question, and refused to proceed with the trial, on the ground, as he certified, "that the issue in the action did not appear to be settled." The plaintiff thereupon moved that a new referee be substituted in his place.

J. D. LIVINGSTON, *for plaintiff.*

J. B. STURTEVANT, *for defendant.*

HARRIS, Justice. The real question which the parties seek to have determined by this motion is, whether the defendant had a right to amend his answer by inserting therein a new defence. Upon this question, different views have been entertained. In *Hollister agt. Livingston* (9 How. 140), it has been examined by Mr. Justice T. R. STRONG, with his usual care, and his conclusion was, that the amendments authorized by the 172d section of the Code are restricted to the matters of the original pleadings. The question was again considered by Mr. Justice MITCHELL, in *Thompson agt. Minford* (11 How. 273). That learned judge was of opinion that no such restriction was intended.

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The same question arose in the superior court of New-York in *Mason agt. Whitely* (1 *Abbott*, 85). This case was argued before OAKLEY, Ch. J., at special term; but three other judges concurred in the decision. It was held, that a plaintiff, when amending his complaint under the 172d section of the Code, might add a new count or cause of action.

I am inclined to concur in this latter construction. The 22d rule of the supreme court, adopted in 1847, and which was in force at the time the Code was enacted, contained substantially the same provisions which are found in the 172d section of the Code. The framers of the Code intended, I think, to have the provisions of that rule embodied in the new system of practice. The court, in framing the rules of 1847, had deemed it necessary to restrict the operation of the 22d rule by providing, in the 23d rule, that it should not be construed to allow amendments to be made by adding new counts or pleas. I can but think that the framers of the Code, if it had been thought advisable to continue the restriction for which the rule last mentioned provides, would have made some express provision on the subject. This view derives some support, I think, from the general tone and spirit of the Code, which inculcates greater liberality in the construction and interpretation of pleadings than had before prevailed, and, in most cases, allows each party, upon some terms or conditions, to shape his allegations as he pleases at any time before the trial.

I am of opinion that, in this case, the defendant had a right to amend her answer at the time and in the manner it was amended, and that the action should be tried upon the issue made by the complaint and amended answer. This motion, therefore, should be denied, but without costs.

The Tyrone and Lock Haven Railroad Company agt Schenck.

SUPREME COURT.

THE TYRONE & LOCK HAVEN RAILROAD COMPANY agt.
ALLEN SCHENCK.

An order, made at special term denying a motion to dismiss the complaint on the ground that the plaintiffs had omitted to file security for costs, is not appealable.

New-York General Term, November, 1859.

Present, ROOSEVELT, P. J., SUTHERLAND and MULLIN, Justices.

THIS was an appeal from an order of Justice INGRAHAM, made at special term, denying a motion to discharge the defendant from arrest; and also from an order made by Justice DAVIES at special term, denying a motion to dismiss the complaint, on the ground that the plaintiffs were a foreign corporation, and had neglected to file security for costs. The first order was made August 4th, and the second, September 9th, 1859.

JOHN W. EDMONDS and E. D. SHERWOOD, for the plaintiffs, moved to dismiss the appeal from the first order, on the ground that it was not made within thirty days from the time the order was entered, and because the defendant had been a second time heard since that order was entered, and the order was at such time confirmed. The second order, it was insisted by EDMONDS, counsel, was not an appealable order, it being merely an order granting leave to substitute a perfect bond for an imperfect one. He contended that no order at special term, as to costs, was appealable. He could find no precedent or provision that would allow an appeal from such orders.

MR. JAMES and L. S. CHATFIELD, *opposed.*

The COURT dismissed the appeal in both cases.

Sorley, Smith and others agt. Brewer & Caldwell.

NEW-YORK COMMON PLEAS.

SORLEY, SMITH and others agt. BREWER & CALDWELL.

Where the plaintiffs claimed a *lien* upon the freight of a vessel, by virtue of advances made to the master, for repairs, supplies and expenses incurred in a foreign port to enable the vessel to obtain a cargo on her homeward voyage, and by an assignment from the master, after her arrival, of all his lien and interest to the freight money and earnings of the vessel, to secure such advances, *Held*, that the defendants, claiming to be entitled to the freight earned, by virtue of a charter-party, previously entered into, between them and the owners (who were alleged to be insolvent), by which the vessel was chartered to them for the voyage in question, be restrained by *injunction*, during the pendency of the litigation, from collecting the freight, and that a *receiver* be appointed to collect the freight earned upon the voyage.

It seems, that a master's lien, thus acquired, cannot be divested by the owners of the vessel by any means short of actual satisfaction by payment.

Special Term, July, 1859.

MOTION for the continuation of an injunction, and the appointment of a receiver.

MARTIN & SMITHS, *for plaintiffs.*

LAROCQUE & BARLOW, *for defendants.*

HILTON, J. It appears that the bark *Convoy*, commanded by Abner Crowell, master, arrived at Galveston, Texas, on her voyage from New-York, in a disabled condition, needing repairs and supplies, and requiring money wherewith to pay charges on cotton for transportation from the interior to the coast, and which payment was necessary to enable her to obtain such cotton as freight.

The plaintiffs were merchants at Galveston, and on the application of the master made the necessary advances for these purposes, by means of which the vessel obtained freight upon her homeward voyage to New-York, amounting to \$2,130.

The amount thus advanced by the plaintiffs was \$3,971 43-100, about \$1000 of which was applied in the payment of the charges upon the cotton, which was obtained by the bark for freight.

NEW-YORK PRACTICE REPORTS.

Sorley, Smith and others agt. Brewer & Caldwell.



After the arrival of the bark at this port, and by writing dated April 8th, 1859, the captain assigned and transferred to the plaintiffs all the freight money and earnings of the vessel upon the voyage, and all lien and interest which he, as such master, had thereto, for or on account of such advances, or of his liability therefor, as collateral security for the repayment to the plaintiffs of the sum thus advanced by them.

The owners of the vessel being insolvent, the plaintiffs aver that they will lose their advances unless they can be protected by a lien on the freight for the advances so made to the captain to enable him to obtain it, and as a court of equity we are asked to enforce this lien thus acquired through the captain for the benefit of the plaintiffs, by appointing a receiver to collect the freight, and restraining the defendants from interfering with it.

In opposition to this claim, the defendants insist that they are solely entitled to the freight earned by virtue of a charter-party, dated December 10th, 1858, entered into between them and the owners of the bark, by which the vessel was chartered to them for the voyage in question. Under this charter-party, the defendants were collecting the freight when this action was commenced, and an injunction against their further interference with it granted.

The plaintiffs now ask that this restraint be continued during the pendency of this litigation, and that a receiver be appointed to collect the freight earned upon the voyage in question.

On the argument of this motion many other facts of a minor character were presented, and many questions discussed which I do not intend to refer to at this stage of the action, desiring that the parties at the trial may not be embarrassed by any view which might now be taken respecting them, and believing that the present application should be disposed of on the facts here narrated.

Nor is it material that the second defence set up in the defendants' answer should be passed upon, further than to remark that it does not appear that, at the time of filing the suit in the

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district court by the plaintiffs against the vessel, *in rem*, claiming a lien for the same moneys which are in this action attempted to be collected as a lien upon the freight, the plaintiffs possessed, by assignment from the captain, his lien as master of the vessel, for indemnity for the personal responsibilities incurred by him as such master in a foreign port.

It, therefore, cannot be said that the plaintiffs might have enforced the lien now claimed in that proceeding, because it is not shown that they possessed any claim to it when that proceeding was instituted.

That the master had a lien upon the freight and earnings of the vessel for the voyage, in respect to his advances and personal responsibilities, necessarily made or incurred by him while at Galveston, for the safety of the vessel and the successful prosecution of her homeward voyage, I think cannot be doubted (*Van Bokelin agt. Ingersoll*, 7 Cow., 670; *S. C.*, 5 Wend. 315; *Lewis agt. Hancock*, 11 Mass. 72; *Ship Packet*, 3 Mason, 255; 3 *Kent*, 167, note 2; *Parson's Mercantile Law*, 381); and this lien, thus given by law, is capable of being assigned by him, so as to vest in the assignee the same rights which he possessed by reason of it. (*Jewell agt. Coffin*, 20 Wend. 603; *Judah agt. Kemp*, 2 John. Cases, 411.)

The plaintiffs, therefore, occupy the same position before the court as the captain or master, and in an action against parties claiming to collect the freight under color of right acquired through a charter-party made with the owners of the vessel, an injunction is sought pending a litigation in which the rights of the respective claimants are to be determined.

I think the circumstances shown are such as justify me in granting the motion.

It cannot be that a master's lien, thus acquired, can be divested by the owners of the vessel by any means short of actual satisfaction by payment, and to so hold would be in effect declaring a lien to exist, which at any moment might be evaded at the will of the owners.

The injunction will, therefore, be continued and a receiver appointed.

Knight agt. Odell.

SUPREME COURT.

JOSEPH KNIGHT, respondent, agt. ROBERT S. ODELL, appellant.

An attorney of this court, or any other person, who is deputed by a justice of the peace to serve, and does serve, the summons in the action, is prohibited from acting as counsel on the trial, by the statute which forbids a constable, who serves the original or jury process, from acting as counsel at the trial.

Albany General Term, October, 1859.

THIS was an action of trespass *quare clausum fregit*, brought in a justice's court, for cutting and carrying away a quantity of hay. There is nothing either in the complaint or in the evidence offered on the trial showing the *locus in quo*, or even the town, county, or state, where the alleged trespass was committed. The defendant did not appear at the trial, that being had at ten o'clock A. M., but he did appear before the justice at the place at one o'clock P. M., for the purpose of answering to said action.

The attorney for the plaintiff was deputed by the justice to serve the summons, and served and returned the same, acted as counsel for the plaintiff on the trial (the plaintiff not being present), and was the only witness sworn on said trial. The same person acted as constable, counsel and witness.

The justice rendered judgment in favor of the plaintiff, and the defendant appealed to the Rensselaer county court, where the judgment was affirmed, and the defendant appealed to this court.

L. R. SAUNDERS, *for appellant*, argued the following points:

I. The justice erred in allowing the person who served the summons to act as counsel at the trial.

1st. Because the statute prohibits the constable who served the original process in the action from acting as counsel at the trial. (2 R. S. 4th ed. p. 34, § 42—and see Crocker on Sheriffs, p. 382.)

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2d. The statute does not prohibit constables generally from acting as counsel at the trial, but the constable who served the original or jury process. Thus it is clear that the legislature intended to prohibit the person who served the process from acting as counsel at the trial, and this case comes precisely within the prohibition intended to be made by the legislature.

3d. Although a person deputized by a justice of the peace is not *eo nomine* a constable, yet he is *quasi* constable, and is to be so regarded in the service of process.

4th. This statutory prohibition applies to causes where the defendant does not appear at the trial; and if in such case the person who served the original process acts as counsel at the trial, the judgment will be reversed if rendered in favor of the plaintiff. (*Crocker on Sheriffs*, p. 382; *Ford agt. Smith*, 11 *Wend.* 74.)

5th. There is in this case, on the face of the return, enough to raise a strong presumption that something wrong was intended in the very commencement of this action. Why was an attorney of this court deputed to serve a summons in a justice's court in a case in which he was himself at once to be constable, counsel, and witness?

Mr. Odell says, that the summons was read to him, returnable at one o'clock P. M., instead of nine A. M.

This, it is true, does not appear upon the return in words. But quite enough does appear to impress upon the mind the probability of the truth of what is above stated.

II. There was no evidence in this case for the justice to pass upon, tending to show that the plaintiff was ever in possession of the premises upon which the alleged trespass was committed.

1st. Because the proof shows the admission of defendant, under oath as a witness on another trial, that he took and carried away, and put in his own barn, a quantity of hay worth six or eight dollars. It may, perhaps, be presumed this was the same hay which the plaintiff spoke of to the defendant at the time the attorney witness heard him talking to the defendant. The language used by the plaintiff was, according

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to the witness's statement: "Plaintiff said to the defendant that he had been in possession of the meadow where the hay grew for the last two or three years, and asked defendant what right he had to come there and take his hay? Defendant says, If I have taken it, you must prove it."

Now, suppose that the defendant, when testifying that he took and carried away the hay, meant the same hay which the plaintiff meant in the above conversation, and what follows? The evidence may have been competent as a conversation between the parties, but the defendant denies that he took away any hay from the possession of the plaintiff, or which belonged to the plaintiff. He says, "If I have done so, you must prove it." This certainly is not an admission that either the hay belonged to the plaintiff, or was taken from his possession, and the plaintiff certainly cannot use his own declarations as evidence in his own favor. And without this there is not a particle of evidence tending to show that the defendant ever took away any hay from any premises in the possession of the plaintiff; nor is there any evidence to show that the plaintiff was ever in possession of any premises upon the face of the earth; nor is there any evidence to show where the *locus in quo* in this case is to be found. The place should be alleged in the complaint, and proved upon the trial, in order to entitle the plaintiff to recover. (See *Cowen's Treatise*, 2d ed., part 1st, p. 370, and cases there cited; also, *id.*, 4th ed., § 1199.)

III. The defendant can raise any objection here which he might have taken had he been present at the trial. (*Tiffany agt. Gilbert*, 4 Barb. 322, and cases there cited.)

IV. The judgment should be reversed with costs.

E. S. STRAIT, for respondent.

GOULD, Justice. I see no cause for reversing this judgment, unless it be that the attorney for the plaintiff served the summons, being specially deputed for that purpose. This, I am rather of opinion, is within the spirit of the statute, which forbids the constable who serves the summons to appear as counsel on the trial.

Sawyer agt. Haskell.

I think the county court and justice's judgment must be reversed.

HOGEBROOM, Justice. I am inclined to concur in the foregoing opinion. The person serving the process, though not *in name*, is, *in fact*, for the purposes of the cause, a constable. The same objections really exist to his appearing and advocating at the trial as to an ordinary officer. Besides the statute says (§ 272), that he "shall be subject to the same *obligations*," which, I think, ought to be construed to include *disabilities*.

YATES COUNTY COURT.

WILLIAM H. SAWYER, respondent, agt. WILLIAM H. HASKELL, appellant.

It is the duty of a party, nolding a promissory note upon which there is a *guarantee of its collection*, to exhaust all legal remedies for its collection, by prosecuting the *maker* with diligence and good faith, before he can resort to the guarantor by action.

Where in such case an action was brought against the maker who put in a defence of payment, made to the payee of the note (not the plaintiff), and the only testimony to sustain the action, or which was produced on the trial, was the deposition of the *defendant* taken on his own behalf on commission, upon which judgment was rendered in his favor, with costs,

Held, that the plaintiff in that suit, the same in this action, had entirely failed to prosecute the maker of the note with diligence and good faith; he should have *subpoenaed* and procured the attendance of the payee of the note as a witness, upon the issue of payment made by the defendant, and especially after he had been requested to do so by the guarantor.

December Term, 1859.

APPEAL from a justice's judgment.

CHARLES S. BAKER, *for appellant*.

JAMES L. SEELY, *for respondent*.

BRIGGS, County Judge. It appears from the evidence that Haskell, the appellant, sold and delivered to Sawyer, the re-

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spondent, a note purporting to have been made by one Livingston Compton, for the sum of \$23.88, payable to W. W. Bramhall, or bearer, bearing date the 17th of May, 1852, and payable in six months after date; and that at the time of such sale he guaranteed the collection thereof in these words: "For value received, I guarantee the collection of the within note."

This action is brought solely upon this guarantee, and the question which I propose to consider is, whether a cause of action was made out in the court below.

The law is now well settled, that a party taking such a guarantee must prosecute all the parties to the note, with due diligence, before he can resort to the guarantor by action. (19 *John*. 69; *Thomas* agt. *Wood*, 4 *Cowen*, 173; *Compton* agt. *Horne*, 5 *Barb*. 501.)

This rule of law will not be doubted or denied; but the practical difficulty has been to properly apply the principle to individual cases. Under ordinary circumstances, the duty of a party, taking such guarantee, is obvious, and no question need arise. The very terms of the contract impose the duty of exhausting all legal remedies for its collection of the makers, as before stated. At any rate, he should prosecute them to judgment and execution, if judgment is obtainable, by the use of due care and diligence.

In the case under consideration, an action was brought against the maker in a justice's court, and he interposed a defence upon this issue. The defendant was examined on his own behalf on commission (he being a non-resident of the state), and upon the trial the testimony of the defendant so taken was read in evidence by the plaintiff therein, who is the respondent here, and the justice, upon the case thus presented, rendered a judgment against the plaintiff in favor of the defendant, for the costs of the action.

The plaintiff in that action produced no witnesses, nor were any sworn, except as before stated. Bramhall was the payee of the note, and the answer of Compton set up that he had paid this note to him, or to his agent or attorney.

Upon this issue Bramhall was a material witness. At least,

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such would be the legal presumption, and under ordinary circumstances Sawyer would have been bound to subpoena him as a witness. Upon one occasion he was present, but the cause was then adjourned, on application of the defendant. He agreed to be present at the adjourned day, but the process of subpoena was not served upon him, although Haskell, the guarantor, requested Sawyer's attorney to subpoena him. As we before observed, Sawyer should have subpoenaed Bramhall and all other necessary witnesses, to establish this note against the maker. His excuse for not doing so is, that Haskell told him, after the guarantee was made, that he would furnish the testimony in the suit against Compton to match him.

It is quite questionable whether this was competent proof under the pleadings; but I do not propose to consider this question, or put my decision upon it. Assuming that, after this guarantee was made, Haskell did agree to furnish the testimony to match Compton, could he do more than to say to Sawyer or his attorney, "here is Bramhall, he is an important witness, I want you to subpoena him?"

I think it was Sawyer's duty to have complied with this request, and it was not using that diligence which the law imposes, by taking Bramhall's *promise* to be in attendance, he should have been served with a process of the court to enforce attendance.

Again, Haskell instructed Sawyer not to subpoena the defendant as a witness. He was unwilling to have him used as a witness, or to rely upon his testimony in obtaining a judgment—but were his directions obeyed? It is true he was not personally upon the witness stand, but in point of fact he was a witness for the plaintiff, Sawyer.

We are not advised by the return what his testimony was, but I think we have a right to presume that it was of such a character as to determine the case against the plaintiff.

Was this using the care and diligence which a man of prudence would have used in the collection of his own note? Would he not rather, *coming down to trial without witnesses* to sustain his action, have withdrawn it, rather than voluntarily

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offer such evidence in the case as he knew, before offering it, would certainly produce a judgment upon the merits against him, thereby forever losing his rights of recovery, however meritorious? I am entirely unable to reconcile this conduct with that rule of law, before laid down, which requires him to prosecute the maker of the note with diligence and good faith.

Even had not Haskell requested Sawyer not to subpoena Compton, I cannot see that the case would have been altered. If he had relied on Haskell's agreement to furnish evidence to match Compton, as is claimed when he found himself at the trial without testimony, it was his duty to have submitted to a non-suit, or to have withdrawn the action. This would have put him in a position to test the validity of the subsequent agreement of Haskell to furnish the evidence, and would have rendered an examination of that question necessary. Had such a course been pursued, the right to enforce this note against Compton, the maker, would not have been impaired; but, as the case now stands, the judgment in the action of *Sawyer agt. Compton* will be a complete bar to all right of action upon this note against Compton by Sawyer or any other person. Of this Haskell has the right to complain.

I think the judgment should be reversed.

NEW-YORK COMMON PLEAS.

JOEL D. BARBER agt. ANTHONY ARNOUX and others.

Where the question before the justice of the peace was one of *fact*—whether the defendants agreed to hire the plaintiff for a year, or whether they agreed to keep him while they needed him, and upon which there was conflicting evidence,

Held, that whether the case was to be regarded as presenting a conflict of evidence on the questions determined by the justice, or whether it was to be considered as a finding in accordance with the clear weight of the evidence, and the probabilities and circumstances shown in the case, was quite immaterial—in either view, the finding of the justice was right and conclusive.

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General Term, June, 1859.

Present—DALY, F. J., BRADY and HILTON, JJ.

APPEAL from a judgment rendered by a justice of the peace.

By the court—HILTON, J. The questions presented by the plaintiff's appeal are of fact, the determination of which was within the powers of the justice, and I think his finding should not be disturbed. The plaintiff claimed to recover the balance of a year's salary, upon the ground that he was employed for the entire year, and could not be discharged, unless for sufficient cause to be shown, or with his consent. One Boyd testified that he was authorized by defendants to thus employ the plaintiff, and that he did so employ him; and the plaintiff swears that under this employment he entered into the service of the defendants, although he admits that they personally never made any contract with him. On the other hand, the defendant testified that he authorized Boyd to employ the plaintiff for a year, but that, on arranging with Boyd for his services, he made some remarks as to the help that would be needed in the store, and Boyd mentioned that the plaintiff was in his employ, and was a good man, stating how much he paid him. They (the defendants) then told Boyd that they would keep the plaintiff while they needed him, and in this manner he came into their employ under an arrangement with Boyd, which was founded upon this interview. Apart from this direct conflict is the principal question, as to whether Boyd was or was not authorized to contract with the plaintiff for his employment for the entire year. I think allowance should be made for the bias under which Boyd evidently rested adverse to the defendants. It appeared that he was in litigation himself with them, and, in addition, had advised the bringing of this suit.

The subsequent acts of the parties may also be looked to in determining what they understood was the agreement made at the time the plaintiff entered into the defendants' service in March, 1857. It appears that he never mentioned the terms

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of the agreement, under which he now claims, to the defendants, nor did he even allude to it at the time of his discharge in November following. On the contrary, nearly a month after, on being paid the balance due him for the term he was employed, viz., \$22.31, he gave the defendants a receipt under date of December 3, 1858 (but which it is manifest, from the evidence, should be dated 1857), stating that the same was "in full of all demands to date."

Besides all this, in the month of March, 1858, he again entered into the defendants' employ for a limited period, for which he was paid; and at this time nothing was said about the four months' wages unclaimed, and which had, according to his present theory, become due on the 4th of March, 1858, the very day he thus entered upon this last-mentioned employment. Whether this case is to be regarded as presenting a conflict of evidence on the questions determined by the justice, or whether it is to be considered as a finding in accordance with the clear weight of the evidence, and the probabilities and circumstances shown in the case, is quite immaterial. I think, in either view, the finding of the justice was right.

Judgment affirmed.

SUPREME COURT

BUCKINGHAM agt. MINOR.

Where the terms for vacating a judgment, and letting the defendant in to defend, were stated to be "all the costs of the hearing before the referee in this action, and of the proceedings subsequent thereto"—*held*, that the sum of \$10, allowed by the Code, for all proceedings after notice and before trial, was properly taxable.

New-York Special Term, October, 1859.

APPEAL from adjustment of costs.

DAVIES, Justice. The only item left undisposed of on the

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argument of the appeal from the adjustment of the costs in this action is that of \$10, being the sum allowed by the Code for all proceedings after notice and before trial.

The judgment was vacated and the defendant let in to defend, upon condition that he pay "all the costs of the hearing before the referee in this action, and of the proceedings subsequent thereto." The fee of \$10 is provided as a compensation for the attorney's services intermediate the notice of trial and the trial, such as the subpoenas and tickets, their service, and procuring the attendance of witnesses as well as brief for counsel, and on the part of the plaintiff, the copy of the pleadings for the court.

In *Dewey agt. Stewart* (6 *How. P. R.* 465), the superior court say they fully agree with Mr. Justice HAND, of the supreme court (*Mitchell agt. Westervelt*, 6 *How. P. Rep.* 265), that the sum provided by the Code (now \$10) is a part of the costs of the trial, term or circuit, and must be paid as such by the party who obtained a postponement of the trial on the payment of costs, or is subjected to the payment of the costs of the term or circuit for any cause. The same points have been ruled in the same way by Justices WILLARD and PARKER. (4 *How. P. R. Rep.* 304; 5 *id.* 336.)

The \$10 are, therefore, to be regarded as a part of the costs of the hearing before the referee. The allowance is for the services consequent upon, and preliminary to that hearing, and thus manifestly intended to be paid as a portion of the costs of the hearing. Such, I think, is the true construction of the order made in the light of these decisions, and that sum should consequently be allowed to the plaintiff, as part of the costs to be paid by the defendant, on condition of opening the judgment and permitting him to come in and defend the action. The costs will accordingly be adjusted on the principle here stated and in conformity with the opinion announced on the argument.

COURT OF APPEALS.

HARVEY B. HILL, plaintiff in error, agt. THE PEOPLE, defendants in error.

One, who is arrested under section 17 of the act, entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16th, 1857, for being intoxicated in a public place, cannot be coerced into a summary trial before the magistrate.

He has the right to give bail for his appearance, at the next oyer and terminer or sessions, to answer the charge, and have the complaint passed upon by a grand jury, and, if indicted, to be tried by a jury of twelve men.

When he offers the requisite bail, the magistrate has no jurisdiction to proceed further upon the charge.

December, 1859.

THE plaintiff in error was arrested by a constable of the town of Cherry Valley, for being intoxicated in a public place, and taken before Charles McLean, Esq., a justice of the peace of that town.

He did not *elect* to be tried for the offence *before the justice*, but tendered the proper bond, under section 16, chapter 628, of Laws of 1857, with sureties as required by that section. The justice decided he could not give bail to appear at the oyer. He sued out a writ of *habeas corpus* before Judge CAMPBELL, who, after examining into the facts, decided he was entitled to give bail. The district attorney removed the proceedings into the supreme court, by *certiorari*, and that court, in the sixth district, reversed the order made by Judge CAMPBELL. Plaintiff removed the record into this court, by writ of error.

NATHANIEL C. MOAK, *for plaintiff in error*, submitted the following points:

I. Plaintiff had a right to give bail to appear and answer the charge at the oyer and terminer. (*People agt. Putman*, 3 *Park. Cr. Rep.* 386, IN POINT. See also 20 *Barb.* 224; 3 *Kern.* 457-8-9; 2 *Park. Cr. R.* 312; 2 *Park. Cr. R.* 322.)

1. Before the passage of chapter 628, of Laws of 1857 (Vol. 2, p. 405), the court of appeals, in *Wynelhamer agt. People* (3 Kern. 378, 426, 457-8-9), had declared the "Maine law" unconstitutional, because it deprived the accused of the right to give bail, and of trial by jury. (See also 20 Barb. 224.)

2. By section 16 (p. 411) of the act, it is made the duty of certain officers "to arrest *all* persons found actually engaged in the commission of *any offence* in violation of this act, and forthwith carry him before any magistrate of the same city or town, to be dealt with according to the provisions of this act."

To avoid the *possibility* of this law sharing the fate of its predecessor, section 16 further provides, that unless the accused sees fit to *waive* his right of *trial by jury*, it shall be the duty of the magistrate, "on sufficient proof that *such offence* (i. e., *any offence* in violation of the act) has been committed, unless such person shall *elect* to be tried before such magistrate, to require a bond, &c., conditioned that such offender will appear and answer the charge at the next term of the court of oyer and terminer or sessions, to be held in said county," &c., "or (if that bond be not given) to commit such offender to the county jail," &c. This provision applies to *any* and *all* "*offences*" in violation of the act (17 N. Y. R. 519), and was here inserted to save the necessity of setting forth, at large, in each section, the method of trial, for the *particular* "*offence*" that section might create.

Section 17 provides that any person, found intoxicated in a public place, shall be taken before a magistrate, &c.; that the magistrate shall "administer to such person an oath or affirmation, and examine him as to the cause of such intoxication, and ascertain the person or persons who sold or gave the liquor to such person."

3. Section 17 does not authorize the magistrate to *try* the accused for an "*offence*" under it. His authority to do so is conferred by section 16, or he has none.

The provisions of section 17 are *cumulative*, and do not *take from* those already made by section 16. It simply provides

that, *independent of the trial and unconnected with it*, on the preliminary examination, the magistrate shall "administer to such person an oath or affirmation, and examine him as to the cause of such intoxication, and ascertain the person or persons who sold or gave such liquors to such person." The design of this provision was not to provide the means of, or a method for *convicting the accused*, but to find evidence against those who may have been selling contrary to law. (3 *Park. C. R.* 508.) Where a statute gives magistrates the right to hold a preliminary examination of persons accused of crimes, it does not limit the right of the *people* to institute accusations before the grand jury. (3 *Park. C. R.* 114, 124-5.) Why should not the converse of the rule hold good as to persons accused, and they be allowed to give bail, unless the statute expressly declares they shall not? (See 2 *Park.* 327.)

(a.) The legislature did not intend in this particular instance to violate the *constitution* (*Constitution of New-York*, article 1, § 6; 3 *Kern.* 443; 3 *Park.* 508) by compelling the accused to be a witness against, or to criminate, himself on the *trial*. If this is required only on the *preliminary examination*, it would not mingle with, or affect the merits on the *trial*, and could not then be given in evidence against him, because procured while under arrest.

(b.) The court ought not to so construe a statute as to deprive a party accused of an "offence," affecting his property and liberty, of the right of trial in the ordinary manner, unless the legislature has *expressly* so provided.

A new and unprecedented mode of trial ought not to be created by *implication*. (31 *Penn. R.* 306; 2 *Park.* 312, 316; 1 *Johns. Cases*, 28; 1 *id.* 229; 1 *Hill*, 130.)

It is unconstitutional to disfranchise or deprive any member of this state of his "liberty, rights or privileges, *unless the matter be adjudged against him upon trial had according to the course of the common law.*" (3 *Kern.* 394-5, 442-6; 4 *Hill*, 145; 3 *Park.* 22; 2 *id.* 312; 2 *Park.* 322.)

4. But to avoid the possibility of doubt, that an "offence," under section 17, was to be tried differently from any other

under the act (§ 17), the section creating the offence declares that being intoxicated in a public place shall be "an offence against the provisions of this act," using substantially the same language as, and evidently intending to expressly bring an "offence," under section 17, within the provisions of section 16 as to the method of trial.

(a.) The word "*offence*" has the same meaning in section 17 it has in section 16.

"All through the statute, violations of provisions of the act are termed *offences*, and it is a primary rule for the interpretation of statutes, that where the same term or expression is used in different parts of the same statute, it shall be deemed to have the *same meaning*, unless the contrary *very plainly appears* to have been the intention of the legislature." (17 *N. Y. R.* 519, 520.)

(b.) It is conceded that, in the construction of statutes, the intention of the legislature is to govern. In seeking for that intention, however, courts are to look at the precise words used, and construe them according to their ordinary sense and meaning, unless it would lead to an absurdity. The intent is to be gathered from the plain language of the statute. (28 *Barb.* 843; *Sedg. St. and Const. Law*, 295-6; *id.* 383; 7 *Hill*, 511; 3 *Seld.* 97; *id.* 209; 7 *Cranch*, 52.)

And where the statute is express, plain and clear, it leaves no room for construction, and is not to be departed from on consideration of policy or hardship, nor are *exceptions to be made* or qualifications inserted, "however abstract justice or the particular case may seem to require." (*Sedg. St. and Const. Law*, 295, 308, 380, 388; 5 *Seld.* 594; 3 *Seld.* 97; 1 *Kern.* 375-6; *id.* 601.)

It is conceded that 2 R. S. 53, § 1 (4th ed.), without making *common* or *habitual* "drunkards and tipplers" guilty of any offence, or providing that they may in any manner be punished, does allow justices of the peace *to require them to furnish sufficient sureties for good behavior*. But how does that prove that another statute, which makes it an offence to be once

intoxicated in a public place, and prescribes a punishment for that offence, was intended to be enforced in the same manner?

(c.) The word "offence" is used in a *criminal* sense in all statutes, unless otherwise expressly declared. (2 R. S. 886, § 37, 4th ed.)

(d.) Every presumption should be made against an intention to give an inferior magistrate an *arbitrary discretion*, without opportunity of review, to *summarily* try and convict citizens of an "offence," which deprives them of their liberty or property without an opportunity for defence before a jury. (*Hurd's Habeas Corpus*, 363; *id.* 405; 31 Penn R. 306; 1 Park. C. R. 95-6; *Sedg. St. and Const. Law*, 313; 2 Park. Cr. R. 312.)

"Lawless power is never so dangerous as when exercised by subordinate tribunals under the forms of law." (18 Johns. 446.)

It is immaterial what *name* the legislature have seen fit to give an offence. It cannot alter the right of trial by jury. (2 Park. 318; 14 Barb. 432; 17 How. Pr. 273; 2 Park. 322.)

(e.) The argument *ab inconvenienti* cannot avail against the provisions of a statute. (7 Hill, 441; 26 Barb. 380; *id.* 481.)

Should the liberty of the citizen be sacrificed to the *convenience* of the public or its officers?

(f.) Had the legislature intended to give the justice power to try the accused in a *summary* manner, they would have so declared, as they have done, relative to proceedings before *justices of the supreme court on habeas corpus* (2 R. S. 802, § 72, 4th ed.), and to justices of the peace. (2 R. S. 82, § 59; 2 R. S. 84, § 72, same edition.)

(g.) The legislature has given this construction to the act. (*Laws 1857, chap. 769, vol. 2, p. 705.*)

This act provides what offences "courts of special sessions" shall have *jurisdiction* to try. By section 1, sub. 13, they have jurisdiction to try "*all offences against the laws, relating to exercise and the regulations of taverns and groceries.*"

When this chapter was passed there was no law to which it could refer, except the act in question.

Section 3 of the same act enumerates the cases where "courts

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of special sessions have *exclusive* jurisdiction to hear and determine charges for crimes and offences within their respective counties," and does not include a case like the present.

If they have not *exclusive* jurisdiction, what other tribunal has jurisdiction? Section 29 of the law in question furnishes the answer: "It shall be the duty of courts to instruct grand jurors to inquire into *all offences* against the provisions of this act, and to present *all offenders* under this act" (17 *N. Y. R.* 519), and hence the provision in section 17, that if the offender *does not elect* to be tried in a court of special sessions, but gives bail, he shall be fined "ten dollars and costs at the same rate as in courts of special sessions;" or in other words, *that his punishment shall be the same whether he is tried in the one court or the other.*

II. The justice had no jurisdiction to try plaintiff.

1. Section 16 provides that, "*unless such person shall elect to be tried before such magistrate*, he shall require a bond to be executed," &c., or, if that be not given, "to commit such offender to the county jail until the judgment of the oyer and terminer or sessions, or he be discharged according to law." The magistrate *has no jurisdiction* to try and sentence the party accused, *unless he elects to be tried before him.* (3 *Park. Cr. R.* 389, 390; 2 *Park.* 327.) This election is a condition precedent to his acquiring jurisdiction to organize a court to try the accused. *Before such election* he acts not as a court but as an officer, to see that offenders are brought to trial. If the accused does not so elect, he is to require bail, and if that be not given, commit the prisoner. Where a statute authorizes a court to try a question in a certain manner, or on a certain state of facts, it has no jurisdiction to do so on any other state of facts, or in any other manner, *even by consent of all parties.* (1 *Hill*, 843; 1 *Seld.* 383; 7 *Abb. Pr. R.* 271; 18 *New-York Rep.* 128.)

2. If he had jurisdiction, he lost it when defendant tendered bail. "On making an offer to that effect, which was refused, a court of special sessions could proceed no further." (*People agt. Berberich*, 11 *How.* 338, *STRONG, J.*; 20 *Barb.* 236-8, *ROCKWELL, J.*)

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LOUIS L. BUNDY, *district-attorney, for defendant in error*, submitted the following points :

I. It cannot be pretended that the right to give bail is given *in terms* by the act in question, unless it be embraced within section 16.

1st. That section evidently embraces the different offences of selling under the act in question, such as selling without license, sections 13 and 14; selling to Indians, section 15; selling to paupers, section 20; selling on Sundays, section 21. These sections refer to a class of cases, a portion of which have always been triable by a court of sessions or oyer, and those that are new are in terms made misdemeanors.

2d. The 17th section *assumes* that the intoxication is to be proved before the drunkard is examined, for he is to be examined as to the cause of "such intoxication," and again, by this section he is to be fined ten dollars, and "costs at the same rate as in courts of special sessions, thus repelling the idea that he is to be tried *in or by* such a court or any other court, only in a summary way."

Again, section 16 provides that it "shall be the duty of sheriffs, &c., to arrest *all* persons found actually engaged in the commission of *any offence* in violation of the act;" and then section 17, as if providing for a class of cases *not before* provided for, says, it "shall be the duty of every such officer, wherever he shall find any person *intoxicated*, to arrest *him*." This provision is entirely unnecessary and unmeaning if being intoxicated is an *offence* under section 16, for the *arrest* is there provided for of *all* persons committing an offence under the act.

Nor does the fact, that it is declared an "offence," conflict with this view, for being subject to criminal punishment would make it an "offence" under the general provision of the statute, although not declared in terms to be such by this act. (8 R. S., 5th ed., 990, § 43.)

It is, therefore, insisted that, by the fair construction of this statute, it contemplates a summary trial and conviction.

II. This view of the statute is in entire harmony with all the antecedent legislation on the subject, and in analogous cases.

By the Revised Statutes in reference to vagrants, and among whom are those lodging in taverns, groceries, &c. (2 R. S., 5th ed., 879, § 1), and also in reference to disorderly persons, among whom are classed "drunkards and tipplers" (2 R. S. 903, § 1), the mode of trial is summary before the justice, and they are not entitled to a trial by jury, and similar statutes have been in force in this state, at least since 1788. (2 Greenl. Laws, 52.)

The objects to be accomplished by those statutes, and the persons (or a portion of them) to be dealt with, are very similar to those provided for by the 17th section of the act in question, and the constitutionality of those statutes was fully settled by the court of errors in *The People agt. Duffey* (6 Hill, 75-78).

Again, the court is to ascertain the intention of the legislature, if possible, and construe the act accordingly. (*The People agt. Barton*, 6 Cow. 293; 5 Wheaton, 76.)

And, where a particular policy in reference to any class of cases or offences has been pursued for a long time, it requires a clear expression of the legislative will to change it. (*Behan agt. The People*, 3 Par. Cr. R. 688; per PRATT, Judge.)

The same terms, substantially, are used in those statutes as the present 17th section, viz.: the person is described as an "offender," and the sentence a conviction. (2 R. S. 874, § 3; 2 id. 903, § 2.)

III. It is insisted that Justice PRATT has not given the true construction to the several provisions of this act, in the case of *The People agt. Putnam* (3 Par. C. R. 386).

We suppose it was upon the strength of that case, and without an examination of the question, that Justice CAMPBELL granted the discharge in the present case.

It is conceded in that opinion, that a summary mode of conviction in analogous cases has been in existence for a long time (see page 388), but bases his opinion on the ground that the

present license law does not make provision for such a conviction.

By the court—S. B. STRONG, J. The principal and only important question in this case is, whether the plaintiff in error, having offered to give such bond as is required by the statute to suppress intemperance, could be coerced into a summary trial for the offence imputed to him before the magistrate.

The 16th section of that statute provides, that it shall be the duty of certain officers, of whom a constable is one, to arrest all persons found actually engaged in the commission of any offence in violation of such act, and forthwith carry the offender before any magistrate of the same city or town, to be dealt with according to the provisions of the act; and that it shall be the duty of such magistrate, on sufficient proof that the alleged offence has been committed, unless the person charged shall elect to be tried before such magistrate, to require a bond, conditioned that such offender will appear and answer the charge at the next term of the court of oyer and terminer, or sessions, to be held in the same county, and abide the order or judgment of such court thereon, or to commit such offender to the county jail until such judgment of said court, or until he be discharged according to law; and the magistrate is required to entertain any complaint of a violation of the act, made by any person under oath, and forthwith to issue a warrant and cause such offender to be brought before him to comply with the provisions of the same section, and to cause such bond, together with all papers and affidavits, with a list of the persons, and residence of the complainant, and witnesses examined before him, to be delivered to the district attorney of the county, whose duty it shall be forthwith to prosecute the same.

The 17th section of the statute is in the following words: "It shall be the duty of any such officer, whenever he shall find any person intoxicated in any public place, to apprehend such person and take him before some magistrate of the same

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city or town; and if such magistrate shall, after due examination, deem him too much intoxicated to be examined, or to answer on oath correctly, he shall direct said officer to keep him in some jail, lock-up, or other safe and convenient place, until he shall become sober, and thereupon forthwith to bring him before said magistrate. And whenever any person shall be brought before any magistrate, as provided in this section, it shall be the duty of such magistrate to administer to such person an oath or affirmation, and examine him as to the cause of such intoxication, and to ascertain the person or persons who sold or gave the liquor to such person; such intoxication being hereby declared to be an offence against the provisions of this act, punishable upon conviction by a fine of ten dollars and costs, at the same rate as in courts of special sessions, and imprisonment in the county jail, workhouse, or penitentiary, until paid—not, however, to exceed ten days. It shall be the duty of such officer to arrest, or cause to be arrested, all such persons when so intoxicated, and of the magistrate to entertain such complaint, and make such examination, under the penalty of fifty dollars, with full costs of suit, for any neglect to comply with the provisions of this section."

By the 29th section, it is made the duty of courts to instruct grand jurors to inquire into all offences against the provisions of the act, and to present all offenders under it. It is provided in the 22d section, that the penalties imposed by the act, except those provided for by sections 8, 15, and 19, shall be sued for and recovered in the name of the Board of Commissioners of Excise. The excepted sections direct, that the penalties therein specified shall be sued for and recovered by other officers or individuals. There can be no doubt but that the offences meant to be included in the provisions of the 16th. and 29th sections of the act are simply those which are punishable as misdemeanors, otherwise they would be partially nugatory, as the oyer and terminer and sessions have jurisdiction only of criminal cases.

The following acts are expressly declared by the statute to be misdemeanors: Commissioners of excise granting licenses

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contrary to the provisions of the act (§ 6); licensed persons selling or giving away spirituous liquors or wines to Indians, or to apprentices, or to any minors under the age of eighteen years, without the consent of master, parent, or guardian (§ 15); any person selling or giving to any pauper, or inmate of any almshouse, strong or spirituous liquors or wines (§ 20); licensed persons selling or giving away any intoxicating liquors or wines on Sunday, or any election day, within a quarter of a mile of the place of holding the election (§ 21); any person adulterating imported or other intoxicating liquors, or knowingly importing or selling adulterated liquors or wines (§ 29). No other offences against the provisions of the statute are therein expressly mentioned as misdemeanors.

It was decided by this court, however, in the case of *Behan agt. The People* (3 *Park. Cr. R.* 686), that vending strong or spirituous liquors or wines, in quantities less than five gallons at a time, without a license, was a misdemeanor, although it was described in the statute (§ 13) simply as an offence. The learned judge who expressed the opinion of the court in that case said, that in looking over all the provisions of the act, in their general scope and tenor, he could not resist the conviction, that offences against its provisions were designed to be punishable as misdemeanors. He relied much upon the construction which had been given to the old excise law by the late supreme court in the case of *The People agt. Brown* (16 *Wend.* 561), and *The People agt. Sterns* (18 *Wend.* 841), where it was held, that selling the prohibited quantities without license was an offence against the provisions of the act, and, therefore, misdemeanors, and indictable. It is, however, expressly declared in the former statute relating to excise, and the regulation of taverns and groceries (1 *R. S.* 652, § 28), that all offences against its provisions should be deemed misdemeanors, punishable by fine and imprisonment, whereas, in the existing statute there is no such declaration. Still, this court must have concluded that, as the general scope of the two statutes was the same, and the legislature must have been influenced by the design to effectuate similar benevolent re-

sults, what was expressly declared in the prior statute should be inferred in the latter. Whatever might have been the opinion of any of us, upon this construction of the statute, if the question had been presented as an original one, we are bound to adhere to the decision of this court in the case of *Behan agt. The People*.

The 16th section of the statute under consideration, when speaking of "any offence in violation of the act," must be deemed to include any act which is thereby prohibited, and which is therein declared to be an offence. Indeed, the latter part of the section goes further, and subjects to its provisions any complaint of a violation of the act. Surely a person who is intoxicated in a public place violates the statute, and such intoxication is expressly declared to be an offence against its provisions, and punishable by a fine, and, if that is not paid, by imprisonment. The 16th section includes all offences under the act, either previously or subsequently defined, unless, indeed, there is an express or strongly implied exception. There is clearly no express exception of the case of the inebriate in the 17th section, nor is one strongly, or, I think, at all implied. The direction to arrest the offender, and convey him before the magistrate, is undoubtedly a mere reiteration of what is required in the 16th section; but it appears to have been repeated for the purpose of engrafting upon it the additional duty of examining the inebriate, and detaining him in temporary custody until he shall become sober. There is no provision whatever for a trial in the 17th section, and the inference from the omission is, that the same proceedings must be had for the conviction of the accused, and his punishment, as in other cases under the same statute. Two modes of procedure are indicated: one by a civil action, in the name of the Commissioners of Excise, for the recovery of a penalty (§ 22), and the other by a public prosecution for the offence (§§ 16, 29). There is no provision for an anomalous proceeding, such as is specified in the provisions of the Revised Statutes, relative to beggars, vagrants, and disorderly persons, where the magistrate is authorized to act upon a summary in-

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vestigation or trial. In those cases persons are charged with habitual misconduct, and not with a specific offence. Persons who are found intoxicated in public places may well be considered as disorderly at the time; so may persons when perpetrating almost any crime; but when publicly arraigned for the offence, they can be summarily tried by the magistrate alone, under the act relative to disorderly persons. Upon a complaint under the act the magistrate can inflict no pecuniary penalty, nor can he punish the inebriate at all, if he proffers sufficient security for his good behavior for one year. No great harm can result from the practice of subjecting such offenders (if they may be so called) to a summary trial before the magistrate alone. But our laws (organic as well as statute) exempt persons charged with criminal offences from coercive summary trials without a jury. Our state constitution provides (article 1, § 2) that the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate for ever.

Under our statute laws, existing at the time of the adoption of our present constitution, a justice could hold a court of special sessions, and could try without a jury, if one should not be demanded, or with a jury of six men, if one should be requested, persons charged with certain misdemeanors, who should elect to be thus tried, or who should fail to give the requisite security, to appear at a court of oyer and terminer, or general sessions, where they could not be tried without indictment, nor by any except a common-law jury of twelve men. Such must be the rule, and such must be the rights, of persons charged with crimes or misdemeanors, now. Any one who may proffer the requisite security has the right to have the complaint exhibited against him, for any crime or misdemeanor, examined and passed upon, by a grand jury, before he can be coerced into a trial, and, if indicted, to be tried by a jury of twelve men. The legislature, no doubt, intended to act in compliance with the constitutional organization in framing and adopting the 16th section of the act under consideration. There is, therefore, a cautious reservation to

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the accused, of the privilege existing at the time when the constitution was adopted and to which it refers, to take his case to a higher tribunal, and when he complies, or offers to comply, with the condition which entitles him to it, the justice of the peace has no longer jurisdiction to adopt any further procedure upon the charge. The legislature deemed, and justly deemed, many of the practices which it condemned, and endeavored to prohibit, as so derogatory to the character of the accused, that he should have a right to the salutary precautions, customary in criminal cases, before he should be subjected to the penalties and degradations consequent upon a conviction. Neither will the community nor the cause of temperance suffer by the delay. Certainty is more desirable than celerity, in the punishment of offenders. Had the framers of the statute designed that the persons accused of its infraction should have been coerced into a summary trial, before the justice, they would have adopted and enacted some clear and explicit provisions to that effect; and certainly they would not have adopted provisions which, if they have any significance, indicate a contrary intent.

The justice of the supreme court, before whom the plaintiff in error was brought on the *habeas corpus*, was right in discharging him from imprisonment, and the judgment of the general term, overruling him, should be reversed.

Judgment accordingly.

SUPREME COURT.

THADDEUS HAIT, JOSEPH H. TUTHILL, and THOMAS SMITH,
Board of Commissioners of Excise in and for Ulster County,
respondents, agt. JOHN BENSON, appellant.

An action brought to recover a penalty under §§ 13 and 14 of the act entitled
"An act to suppress intemperance, and to regulate the sale of intoxicating

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Liquors," passed April 16, 1857, by "A. B., C. D., and E. F., board of commissioners of excise," plaintiffs, complaining and setting out specifically the whole cause of action as accruing to them as the board of commissioners of excise, is sufficiently brought "in the name of the board of commissioners of excise," as required by § 22 of said act.

This decision seems to overrule the one on this point in Pomeroy agt. Sperry (16 How. 211), by holding that the action may be brought in either form—that is with or without the individual names of the commissioners—if "the board of commissioners of excise" is properly named as plaintiff, and the cause of action alleged as accruing to it. The case of The Board of Commissioners of Excise of Saratoga County agt. Doherty (16 How. 211) is affirmed by this decision, as the question there was, whether the action was properly brought without naming the commissioners individually, and it was held that it was properly brought in the name of the board.—REF.)

Albany General Term, September, 1859.

Present, WRIGHT, GOULD, and HOGEBROOM, Justices.

THIS was an action commenced by the above-named respondents, before James H. Brown, a justice of the peace of the county of Ulster, against the appellant, for violations of sections thirteen and fourteen of the act entitled, "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16, 1857.

The complaint was as follows :

"The plaintiffs, as such board of commissioners of excise, in and for the county of Ulster, show to this court, that heretofore, to wit, on the first day of July, 1857, and on each and every day thereafter to the day of the commencement of this action, at the town of Lloyd, in said county, the said defendant, John Benson, became and was indebted to the plaintiffs, the board of the commissioners of excise, as aforesaid, in the sum of fifty dollars, for selling strong and spirituous liquors, or wines, in quantities less than five gallons at a time, without having a license therefor, at his shop in Lloyd aforesaid, contrary to and in violation of the provisions of 'An act to suppress intemperance, and to regulate the sale of intoxicating liquors,' passed April 16, 1857, whereby and wherefor an action has accrued to the said plaintiffs, as such board of commissioners of excise, to demand and have of and from the said defendant the said sum: yet the said defendant, al-

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though often requested so to do, has not as yet paid the said sums of money, or either of them, or any part thereof—he, the said defendant, hath hitherto wholly refused, and still refuses so to do.

“2. And, further complaining, show that the said defendant was, on the first day of July, 1857, at Lloyd, in said county, and on each and every day thereafter, since the said first day of July, 1857, up to the 24th day of June, 1858, indebted to the said plaintiffs, the board of commissioners of excise, as aforesaid, in the further sum of fifty dollars, for selling strong or spirituous liquors, or wines, in quantities less than five gallons at a time, without having a license therefor, to wit, one glass of rum, one gill of rum, one glass of brandy, one gill of brandy, one glass of whisky, one gill of whisky, one glass of gin, one gill of gin, one glass of wine, one gill of wine, one glass of beer, one gill of beer, to each of the following named persons, to wit: John Ellis, David Berryann, Peter Decker, Bradley S. Lewis, Robert Conu, Harvey Dunn, Daniel Donaldson, and others, at his shop in Lloyd aforesaid, on the first day of July, 1857, and on every and each day since, to the commencement of this action, contrary to the provisions of an act of the legislature of the state of New-York, entitled, ‘An act to suppress intemperance, and regulate the sale of intoxicating liquors,’ passed April 16th, 1857, whereby an action has accrued to the said plaintiffs, as such board of commissioners as aforesaid, to demand and have of and from said defendant the said sum of money above demanded, which defendant has not paid.

“Wherefore, plaintiffs, the board of commissioners of excise, as aforesaid, demand judgment against said defendant for the sum of one hundred dollars and costs.”

On the return day of the summons the defendant did not appear. Thaddeus Hait, one of the board, and Solomon G. Young, appeared for the plaintiff.

Solomon G. Young proved that he was authorized to appear for the plaintiffs, and that Hait, Tuthill and Smith formed the board of commissioners.

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The plaintiff proved, by several witnesses, violations of the law, and the sale of various kinds of intoxicating liquors.

The justice, on the second day of July, 1858, rendered judgment for the sum of one hundred dollars damages, and four dollars and sixty-eight cents costs of suit, in favor of respondents, who were plaintiffs, and against the appellant, who was defendant.

On the same day, the appellant appealed to the county court of Ulster county, on the ground, among others, that the suit was irregularly brought in the individual names of the plaintiffs.

The county court having affirmed the judgment of the justice's court, the appellant appeals to this court.

E. COOKE, *for appellant.*

First. The defendant did not appear in the action. He cannot be said, therefore, to have waived any objection to the proceedings. (*Northrup agt. Jackson*, 13 *Wend.* 85; 7 *John.* 18; *Squier agt. Gould*, 14 *Wend.* 159.)

Second. The suit was improperly brought in the individual names of the commissioners. The action is given to the "Board of Commissioners of Excise of the county," and should have been prosecuted in that form. (*Act of 1857*, § 22; 2 *R. S.* 944, § 23, 5th ed.; 3 *R. S.* 774, § 107, 5th ed.; *Commissioners of Saratoga Co. agt. Doherty*, 16 *How. Pr. R.* 46; *Pomeroy et al. agt. Sperry*, *id.* 211.)

In this case Hait, Tuthill and Smith are the plaintiffs, the addition of their office is mere description. The action is not maintainable by them. (*Hill agt. Supervisors of Livingston Co.*, 2 *Kern.* 52; *Gould agt. Glass*, 19 *Barb.* 185-6; *Ogdensburgh Bank agt. Van Rensselaer*, 6 *Hill*, 240.)

Third. The proceedings are not amendable in this court. (19 *Barb.* 156.)

Fourth. The evidence of Solomon G. Young was irrelevant. The matters testified by the witness were not alleged in the complaint.

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T. R. WESTBROOK, *for respondents.*

I. There was a proper appearance in behalf of the plaintiffs, and the right to appear was abundantly proved.

1st. Thaddeus Hait, who was one of the board, being present, the right to use the name of the board will be inferred. (*Downing agt. Rugar*, 21 *Wend.* 178; *The People ex rel. Durham agt. Commissioners of Canal Fund*, 3 *Hill*, 599.)

2d. The authority to use the name of the board was proven by the attorney, who also testified that the parties who authorized him to appear formed the board of excise.

II. The county court properly overruled the objection, that the action was "irregularly brought in the individual names of the plaintiffs."

1st. The action is not brought in the *individual* names of the plaintiffs, but by the board, *as a board*, and the names of the individuals are inserted to show who constitute the board.

This is manifest, not only from summons, but complaint, which shows that the *board* sues for the penalties, and claims them as the "*Board of Commissioners of Excise.*"

2d. The twenty-second section of the act under which this action is brought, requiring penalties to "be sued for and recovered in the *name* of the Board of Commissioners of Excise," is substantially the same as section 105, page 715, 2 R. S. (4th ed.), section 93, page 493, of old edition, requiring certain officers to sue "in the *name* of their respective offices;" and yet it has been repeatedly held that the use of the individual names of such officers is not only no error, but is necessary for the maintenance of the action. (*Supervisors of the town of Galway agt. Stimson*, 4 *Hill*, 136; *The Agent of the State Prison at Mount Pleasant agt. Rikeman & Hubbell*, 1 *Denio*, 279; *The Commissioners of Highways of the town of Cortlandville agt. Peck*, 5 *Hill*, 215.)

3d. If it was improper to insert the *names* of the individuals constituting the board of excise in the summons, inasmuch as the complaint shows that the board sues in fact, such names can be stricken out by the court, under the power of amendment conferred upon them by the Code. (*Code*, §§ 173, 176;

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see, also, notes to these sections, *Howard's Code*, pp. 296-302; *Commissioners of Excise agt. Sperry*, 16 *Howard*, 211.)

III. The complaint is sufficient. It contains *two* counts. The first is a general one, in which the plaintiffs, *as a board*, claim fifty dollars of the defendant, for selling strong and spirituous liquors, or wines, in quantities less than five gallons at a time, without having a license therefor, at his shop, in Lloyd aforesaid, contrary to and in violation of the provisions of "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16, 1857.

The second count is similar to the first, except that it *specifies* the kind and quantity of liquor sold, and the parties to whom it was sold.

1st. It will be seen, by a reference to the complaint, that there is no force in the objection that the judgment was erroneous, for the reason that only a *single* penalty can be recovered under *one* count in a complaint.

The complaint has *two* counts—under either of which a recovery would be proper. The *general* count is good. (*People agt. Bennett*, 5 *Abbott*, 384; *same case affirmed*, 6 *Abbott*, 343; *Hall and Wheeler, Overseers, &c.*, agt. *McKechnie*, 22 *Barb.* 244; *Phinny agt. Phinny*, 17 *Howard*, 193.)

2d. The recovery would be good under the second count. It shows *several* violations of the excise law, and under no rule of pleading applicable to *justices'* courts would the plaintiffs be confined to a single penalty, as there is no particular mode of separating causes of action in that court. (*Code*, § 64, *sub.* 5; *Hall and Wheeler, Overseers, &c.*, agt. *McKechnie*, 22 *Barb.* 244.)

3d. The plaintiffs having established, by the *proof*, a right to recover for more than *two* penalties, the court, for the furtherance of justice, would allow the pleading to be amended, if necessary, to sustain the judgment. (*Code*, §§ 173, 176, and *notes supra*; *Bate agt. Graham & Jordan*, 1 *Kernan*, 237.)

GOULD, Justice. It seems to me that the decisions in 4 *Hill*, 186, and 5 *Hill*, 215, and 1 *Denio*, 279, are not at all

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at variance with that in 6 *Hill*, 240; nor do I see that 2 *Kern*. 52 alters either of those prior decisions. And while I am confident that this suit would have been well brought in the name of the Board of Commissioners, without the individual names of the members of that board, there can be no pretence that the whole cause of action is not specifically and appropriately alleged as accruing to them *as* the Board of Commissioners, and *to* the Board of Commissioners. Under these circumstances, I see no occasion for holding the words, "Board of Commissioners of," &c., to be merely "*descriptio personarum*," any more than for holding that the individual names are mere surplusage, where the right of action is well set forth, and the proper party plaintiff named as such.

I should affirm the judgment.

HOGEBROOM and WRIGHT, *Justices*, concurred.

SUPREME COURT.

THE SHOE AND LEATHER BANK agt. AUGUSTUS J. BROWN.

Under the Code the plaintiff need not aver in his complaint any fact not necessary to be proved on the trial. And as it has been held by the court of appeals (3 *Kern*. 309), that a corporation need not prove its corporate existence, unless the defendant pleads expressly that the plaintiffs are not a corporation, it follows that the plaintiffs need not allege in their complaint or refer to the act of their incorporation.

New-York Special Term, September, 1859.

THIS action was brought upon a promissory note made by the defendant, Brown, and transferred by the payee to the plaintiffs. The complaint alleged that the plaintiffs were a corporation formed under the laws of this state, but made no allusion to the act of their incorporation. The defendant de-

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murred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

F. C. CANTINE, *for defendant.*

D. McMAHON, *for plaintiffs.*

INGRAHAM, Justice. The plaintiffs, a corporation under the banking law, sue upon a note held by them, without setting out the title and date of the act under which it was created. The defendant demurs upon the ground that the complaint does not show facts sufficient to constitute a cause of action, alleging that it appears on the complaint that the plaintiff has not legal capacity to sue.

In *The Bank of Waterville* agt. *Beltzer* (14 *How. P. Rep.* 270), Judge EMOTT held, that no such averment was necessary in the complaint, and refers to various cases under the former system of practice, as well as under our present Code, sustaining his views of this question.

In *The Bank of Lowville* agt. *Edwards* (11 *How. P. R.*, p. 216), it was held by Mr. Justice HUBBARD, that a general demurrer, that the complaint did not contain facts sufficient to constitute a cause of action, did not reach the objection, that the corporation did not aver the act of incorporation. In both cases, it was held that the objection must be specially taken to the existence of the corporation, as required by statute.

The only case conflicting with these decisions is that of *Johnson, president*, agt. *Kemp* (11 *How. Pr. Rep.* 186), in which Mr. Justice MITCHELL held, that a bank, suing under the banking law, must aver in the complaint the act and date of its passage under which it was incorporated.

In *The Bank of Havana* agt. *Wickham* (16 *How. Pr. Rep.* 97), Mr. Justice BALCOM approves of this decision, as stating the correct rule, but at the same time admits that if the case of *The Bank of Lowville* agt. *Edwards* is to be applied, the complaint would be sufficient, and holds in that case, that a special denial is necessary in the answer. I think, however, the court of appeals in *The Bank of Genesee* agt. *The Patchin Bank* (3

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Kernan, 309), have settled between these conflicting cases, by holding that a corporation need not prove its corporate existence, unless the defendant plead expressly that the plaintiffs were not a corporation. If so, it need not be stated in the complaint, because it is well settled that under the Code the plaintiff need not aver in his complaint any fact not necessary to be proven on the trial. The same point was expressly decided in *Kennedy agt. Colton* (28 Barb. S. C. Rep., p. 60). I understand the general term in this district have also so held.

I think, therefore, the plaintiff is entitled to judgment. Motion granted.

SUPREME COURT.

JOHN C. CAMERON agt. JONATHAN W. FREEMAN and others.

Under the provisions of the Code, as formerly under the Revised Statutes, the court cannot order a *reference* against the will of any of the parties, or without the consent of the parties, unless the issues in the action involve *directly* the examination of a *long account*.

It is not enough that such an examination may, in the progress of the trial, become important *collaterally* for the purpose of establishing some other issue.

An action of *tort* was never referable, although it frequently happened that the trial of such an action involved *incidentally* the examination of a long account.

Where it was denied that one of the defendants, to whose rights the plaintiff had succeeded, was ever interested as a partner in the transactions in respect to which an account was sought—*held*, that this issue must be established in favor of the plaintiff, before an accounting can be necessary. And whether the transactions, in which it was alleged that such defendant had an interest, were settled and closed with another defendant as one of the partners—*held*, that this issue too would have to be determined against the defendants before the plaintiff would be entitled to an accounting for any amount which might be due him.

Albany Special Term, March, 1859.

MOTION for a reference.

The facts in the case are substantially the same as are stated

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in *Church agt. Freeman* (16 How. 294). The cause is at issue upon separate answers of all the defendants. The motion to refer was founded upon the pleadings, and an affidavit of one of the defendants, stating that the trial of the action will involve the examination of a long account, both on the part of the plaintiff and the defendant Church, both as to the liability of the defendants Freeman and Grant, and each of them, as claimed in the complaint, and also as to the extent of such liability.

W. A. BEACH, *for plaintiff.*

A. B. OLIN, *for defendant Freeman.*

J. H. REYNOLDS, *for defendant Grant.*

D. L. SEYMOUR, *for defendant Church.*

HARRIS, Justice. It is declared by the first subdivision of the 271st section of the Code, that the court may, without the consent of the parties, direct a reference "where the trial of an issue of fact shall require the examination of a long account on either side." Substantially the same provisions had long before existed. (2 R. S. 384, §§ 39, 41.) Under these provisions, it was well settled that a reference could not be ordered against the will of any of the parties, unless the accounts to be examined were directly in issue. An action for a *tort* was never referable, although it frequently happened that the trial of such an action involved *incidentally* the examination of a long account. "The legislature intended," says BRONSON, J., in *Dedrich's administrators agt. Richley* (19 Wend. 108), "to provide for those cases only where an account was *directly* involved in the issue, and where little was to be done beyond a proper adjustment of the dealings of the parties." (See also *Silmser agt. Redfield*, 19 Wend. 21; *Dewey agt. Field*, 13 How. 437; *McCullough agt. Brodie*, 13 How. 346.) In the latter case, BOSWORTH, J., says, that though "it may be true that the class of actions in which the court can order the whole action to be tried by the referee, without the consent of either party, is enlarged by the Code, the fact which warrants the exercise

of the power is the same now as when the Revised Statutes alone gave the authority to refer."

If this be so, if the fact, which warrants the court in directing that the issues in the action shall be tried by referees, is the same now as it was when the court derived its authority to refer from the Revised Statutes, it follows, in the light of the established practice as it existed before the adoption of the Code, that the court is only authorized to direct a reference when the issues in the action involve *directly* the examination of a long account. It is not enough that such an examination may, in the progress of the trial, become important *collaterally* for the purpose of establishing some other issue.

In this case, it is denied that Coffin, to whose rights the plaintiff has succeeded, was ever interested in the transactions in respect to which an account is sought. This issue must be established in favor of the plaintiff, before an accounting can be necessary, or even proper. Again, it is insisted that, whether Coffin was interested or not, the transactions have been settled and closed with the defendant Grant, one of the partners. This issue, too, will have to be determined against the defendants, before the plaintiff will be entitled to have an account stated, for the purpose of ascertaining any amount which may be due to the plaintiff. It is insisted, however, that this latter question incidentally involves the state of the accounts at the time the alleged settlement was made. This may be so. It is unnecessary now to determine whether, upon this issue, the plaintiff would be allowed to investigate the accounts between the parties, with a view to show that the settlement ought not to be enforced. Assuming that such evidence would be admissible, it does not render the issues to be tried referable, on the ground that they involve the examination of a long account. Nor, on the other hand, is it required that the court, upon the trial of these issues, shall investigate these accounts. The second subdivision of the section of the Code, relating to this subject, provides for such a case. If, with a view to enable the court upon the trial to determine whether the alleged settlement shall be held to conclude the parties, it shall be

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deemed important to ascertain the state of the accounts at the time the settlement was made, the court will be authorized, if it think fit so to do, to order a reference to obtain this information. The referee, in such a case, does not decide the issues between the parties, but merely reports to the court the state of the accounts. Such references are analogous to those which might be made to a master in chancery, under the former system of equity practice, for the purpose of enabling the court to make the proper decree upon the coming in of the report. (See *Palmer agt. Palmer*, 13 *How.* 363; *Graham agt. Golding*, 7 *How.* 260.) In the latter case, it was held that the question of partnership must be settled by an issue or by the court, before a reference could be ordered. "Until it is known that there is a partnership," says MITCHELL, J., "it cannot be said that the trial will require the examination of a long account." In *Mills agt. Thursby* (11 *How.* 113), which case, though subsequently reported, was decided previously, the same learned judge had, under the peculiar circumstances of the case, to which he refers in *Graham agt. Golding*, granted a general order of reference to state the accounts of an alleged partnership. Upon an examination of that case, it will be found, that the pleadings directly involved an examination of the accounts between the parties. The partnership agreement was admitted. This agreement was conditional. The plaintiff, if within a specified time he had contributed a certain amount of capital, was a partner; if he had not, then he was not a partner. To determine whether he had complied with this condition or not, an examination of the accounts was deemed necessary. Upon this ground alone, the motion for a reference was granted. The entire issue between the parties depended upon the state of the accounts between them.

In the case now under consideration, the first issue to be tried is, whether Coffin was ever a partner in the transactions in respect to which an account is sought. If he was not, there is no pretence that an accounting can be necessary. If, upon the trial, this issue should be determined in favor of the plaintiff, the court will be at liberty to make an interlocutory order

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to that effect, and then order that the accounts between the parties be stated for its own information in respect to the other issues, and for that purpose may direct a reference, or it may proceed, without a reference, to determine the other issues. These are questions addressed to the discretion of the court upon the trial.

This motion, therefore, must be denied. The costs of opposing the motion should abide the event of the suit.

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Where a party, or attorney, in disregard of a *stipulation* entered into by them in the cause—*e. g.*, to change the venue—proceed in the cause, on the alleged ground that the stipulation was obtained by fraud, and has no binding force, they take the peril, in case the question of fraud is decided against them, of having all their proceedings set aside as *irregular, with costs*.

New-York Special Term, October, 1859.

At the April special term, held at Albany, in the third judicial district, the plaintiff and defendant made counter-motions to set aside the different judgments entered in this action. The first judgment was entered by the plaintiff on the 15th day of November, 1858, in the first judicial district in the city of New-York, and the second by the defendant in the third judicial district in the county of Rensselaer, on the 29th of December, 1858. The place of trial was originally in the county of Rensselaer. While there the cause was referred by consent of parties to a referee, who made a report in favor of the defendant in 1854.

The plaintiff took exceptions to the findings of the referee, and a case was made by the plaintiff, and the cause was brought to argument thereon, before the general term of the third district, at December term, 1856. On the 14th day of March,

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1857, the decision of the general term of the third district was announced, affirming the judgment entered on the report of the referee, as appeared by an order or entry in the minutes of the general term of that district of that date.

Nothing further was done by the attorneys of either party in the cause until September, 1857, when the defendant's attorney noticed the cause for argument before the general term of the third district for December, 1857. On receiving that notice, the plaintiff, who, with the defendant's attorney, then resided in the city of New-York, went to the defendant's attorney, and they entered into a stipulation that the venue, or place of trial, be changed from the county of Rensselaer to the city and county of New-York, and that the appeal be changed from the third district to the first judicial district, and be put upon the calendar of the general term, and be heard with all convenient speed, and that H. G. Wheaton is acknowledged as the sole attorney of the defendant, Hall, in this action. Upon this stipulation being filed, together with the notice of substitution of defendant's attorney, and the notice of argument for the December general term in the third district, an order was obtained *ex parte* in the first judicial district, changing the place of trial to the city of New-York, and directing a transfer of all the papers in the case from the clerk of the county of Rensselaer to the clerk of the city and county of New-York.

Subsequent to this, both parties noticed the cause for argument to the general term of the first district, and it was argued there. In June, 1858, the general term in New-York *reversed* the judgment entered on the report of the referee, and granted a new trial. By consent and stipulation the cause was then referred to Judge Peabody as sole referee, who heard the proofs and allegations of the parties, and reported in favor of the plaintiff for \$1,072.29, on the 16th of October, 1858. The defendant, and his attorney and counsel, repeatedly appeared before the referee in New-York. On this last report, the plaintiff, on notice, adjusted his costs and entered judgment in the city of New-York for \$1,592.98, damages and

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costs, on the 15th of November, 1858. The defendant's attorney, alleging that he had forgotten the argument, and *had not heard* of the decision of the cause by the general term of the third district, about the 22d day of November, 1858, procured a formal order to be entered of the affirmance of March 14th, 1857, of the judgment entered on the report of the first referee, and having served the same, with notice of the adjustment of costs before the clerk of Rensselaer county, appeared before the latter officer, who refused to adjust the costs or enter the judgment, upon the ground that the cause had been transferred to the city of New-York. At the December special term, 1858, an alternative mandamus was issued, at Albany, to the clerk of Rensselaer, requiring him to adjust the costs and enter the judgment, but without prejudice to the plaintiff's right of moving to set aside the same. The clerk obeyed the mandamus, and the plaintiff's costs were adjusted by him, and judgment entered in Rensselaer on the 29th of December, 1858, upon the report of the first referee, for \$358.03, damages and costs.

At the Albany special term, held in April, 1859, the plaintiff moved to set aside this last judgment, and all subsequent proceedings, and all previous proceedings had in the third judicial district after the stipulation to change the venue and place of trial; and the defendant moved to set aside the plaintiff's judgment and all subsequent proceedings, and all previous proceedings in the city of New-York, after the order of affirmance of March 14th, 1857. These motions were both heard together.

On the 26th of April last, Justice HOGEBROOM decided the motions, and made an order upon the plaintiff's motion to set aside the defendant's proceedings and judgment, that the same be denied as not made before the proper tribunal, without costs, and without prejudice to a renewal thereof upon the same or other and additional papers in the first judicial district.

And upon the defendant's motion to set aside the judgment entered up in favor of the plaintiff in the first judicial dis-

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trict, the same justice denied the same *upon the merits*, without costs, and without prejudice to a renewal thereof, upon the same or additional papers, to the first judicial district.

From the latter order, the defendant appealed to the general term of the third district, which, at the term held on the 17th of September instant, ordered that the order of special term, denying the motion, to vacate the order, changing the place of trial, and to set aside the subsequent proceedings, be affirmed.

The plaintiff now renews the motion made by him, to set aside the judgment docketed against him in this cause with the clerk of the county of Rensselaer, on the 29th of December, 1858, and all subsequent proceedings therein, and all proceedings in this cause in the third judicial district, since the stipulation made in September, 1857, changing the place of trial, in accordance with the leave given.

JOHN FITCH, *in pro. per.*, for motion.

H. G. WHEATON, for defendant.

DAVIES, Justice. The main ground relied on to oppose this motion—that is, that the order of this court, changing the place of trial from the county of Rensselaer to the city and county of New-York; was irregular and void—has been disposed of at the special and general terms, in the third judicial district.

That question was distinctly presented before Justice HOGGBOOM, on the defendant's motion heard before him in April last, to vacate and set aside the plaintiff's judgment. In his opinion, he says, "The defendant alleges that this order was ineffectual and without jurisdiction, being made in the *first* district, when the place of trial was still in the *third* district. But I cannot so regard it. It was effectually an *ex parte* order, both parties having agreed upon its terms. They both desired to change the place of trial, and both must be presumed to have consented to an order to that effect, to be executed whenever it was convenient. At all events, the stipulation, unless obtained by fraud, should be regarded as operative. I can

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see no well-grounded objection, if it be necessary for the purposes of justice, to entering an order upon it now in the third district, giving it relation back to the day when the order was entered in the first district." He also says, "I regard the defendant as having, on various occasions, acquiesced in the transfer of the cause to the city of New-York; and I think he should, for the purpose of this motion, be regarded as estopped thereby."

Justice HOGEBROOM then examines and discusses the question of fraud suggested in obtaining the stipulation, and holds that both parties may have acted in good faith. In this view I entirely concur.

As the results of his examination and opinion, Justice HOGEBROOM held, that the case was, therefore, properly heard in the city of New-York, and the judgment entered there must be deemed regular. As a consequence, the judgment perfected in Rensselaer county must be regarded as irregular, and should be set aside. And he adds, "But I do not see that it can be done upon this motion. This is not the place to do it. The cause is not here, but in the city of New-York, and the motion should be made to the first district."

From this order of Justice HOGEBROOM, the defendant appealed to the general term, which affirmed the order denying the motion to vacate the order changing the place of trial, and to set aside the subsequent proceedings therein. The motions are, therefore, *res adjudicata* in this court, and I have but to do what the court in the third district say should be done, set aside the judgment entered up by the defendant in this cause, and all subsequent proceedings therein, and all the proceedings had or taken by the defendant in the third judicial district since the date of the stipulation changing the place of trial.

As these proceedings were irregular, the motion is granted, with \$10 costs.

Chappel agt. The Schooner John E. Clayton.

UNITED STATES CIRCUIT COURT.

ISRAEL CHAPPEL and others agt. THE SCHOONER JOHN E.
CLAYTON.

In claims for *salvage*, the courts always look to the nature and character of the service, the time consumed by the salvors, the peril involved, the expense, as well as to the situation and condition of the vessel saved, and its value, in fixing compensation.

As a general rule, the rate of salvage of a vessel, which is derelict at sea, is a *moiety* of her value. This, however, except in very special cases in which great hardships and damages have been encountered, is the extreme limit.

New-York, October, 1859.

APPEAL from a decree awarding salvage compensation.

NELSON, C. J. The libel was filed in this case to recover salvage. The master and hands of the sloop T. E. Crocker, five in number, were on their way to the fishing grounds, which are about thirty miles from Sandy Hook, on the morning of the 27th of November, 1856, and when some twelve or fifteen miles from the Hook discovered a vessel, which afterward was found to be the schooner John E. Clayton, on her beam ends, with a large hole stove in her side, sufficient to have sunk her instantly, had it not been for her load of cargo, which was wood. She lay in the open sea about two miles from the track, and when reached it was ascertained that the crew had abandoned her.

The weather was fair, but the sea somewhat rough, with a strong breeze from the land. The sea was breaking over the vessel and drifting her further from the land. It was necessary to strip her of her sails and cut away her foremast in order to right her. The libelants were assisted by another vessel, the Tobiatha, and both vessels were engaged from six or seven o'clock in the morning till two in the afternoon, in righting the derelict and preparing her to be towed to New-York.

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They reached Jersey City about nine o'clock that evening. The vessel saved was admitted to be of the value of \$3,000. The court below allowed a gross sum of salvage to the amount of \$1,200, being two-fifths the value of the vessel.

As a general rule, it is undoubtedly true, that the rate of salvage of a vessel, which is derelict at sea, is a moiety of her value. This, however, except in very special cases, in which great hardships and damages have been encountered, is the extreme limit.

The courts always look to the nature and character of the service, the time consumed by the salvors, the peril involved, the expense, as well as to the situation and condition of the vessel saved, and its value, in fixing the compensation; not upon the idea of a *quantum meruit*, but by way of rewarding the services in proportion to the degree of merit belonging to the particular case.

Now, in the case before us, there is nothing in the evidence showing any extraordinary degree of merit, at any great sacrifice of time or money. The vessel was found some twelve or fifteen miles from the bay of New-York, within two miles of the track of the salvors on their fishing expedition; a day only was consumed in raising and bringing the derelict to port. The weather was pleasant, and no particular hardship or danger was encountered.

We cannot but think that the amount allowed by the court below exceeded a reasonable compensation for the service, and that one-fourth of the value will afford ample value to the salvors, and the most that should be awarded under the circumstances. The service rendered by the *Tobiatha* seems to have been very slight, according to the evidence.

We shall, therefore, modify the decree of the court below, by awarding to the Thomas E. Crocker and hands \$600; and to the *Tobiatha* and hands \$150, without costs on either side in this court. The costs to stand for libelants as decreed in the court below.

SUPREME COURT.

PALMER, assignee, agt. SMEDLEY, and four other causes.

The defendant, in his answer, set up as a defence to an action on his promissory note, that the note was given upon a representation that the Antioch College (the note being given for a scholarship in said college), would be located in Western New-York, and that the directors had decided on such location, which the defendant believed to be true, when it was in fact not true, nor was such college established in Western New-York. That the note was obtained in consequence of such false representations, and, therefore, there was a failure of consideration.

Held, on demurrer, no defence at all.

New-York Special Term, October, 1859.

INGRAHAM, Justice. The plaintiff sued upon a note given to the Antioch College for a scholarship.

The answer sets up as a defence that the note was given upon a representation that the college would be located in Western New-York, and that the directors had decided on such location, which the defendant believed to be true, when it was in fact not true, nor was such college established in Western New-York.

That the note was obtained in consequence of such false representations, and that there has been thereby a failure of consideration.

I do not see in this answer any statement of facts which can be said to be a defence.

It is not good, if intended as a defence, that the note was obtained by false representations, because it does not charge that the representations were made with the fraudulent intent to deceive the defendant, nor any knowledge of their falsity at the time they were made.

Nor can it be held sufficient as setting up a counter-claim by way of damages for a breach of warranty, as suggested by the defendant's counsel.

Graham agt. Sheken.

If such a defence could be made to a note given for such a consideration, then it could only be available by setting up the agreement as made by the corporation or by their direct authority, averring the breach of the contract, and alleging damage sustained by the defendant in consequence thereof.

No such claim is set up in the answer, no breach of the contract is properly set out, and no damage is claimed to have arisen therefrom.

Under this view of the answer demurred to, I am forced to the conclusion that it contains no defence, and forms no issue on which the parties can go to trial.

The plaintiff is entitled to judgment on the demurrer in each case.

UNITED STATES CIRCUIT COURT.

JOHN GRAHAM agt. EDWARD SHEKEN, impleaded, &c., with
C. & R. POILLON and others.

Where it appeared that the complainant made three *bills of sale*, absolute on their face, of three steamships owned by him, but in fact as a *security* for a loan of \$100,000, upon a *usurious* contract, in which was secured more than 7 per cent. for the forbearance of the loan,

Held, that the contract and bills of sale were void in law, and must be set aside, and that the complainant was entitled to be restored to his interest in and possession of the vessels, or, in case either of them could not be restored, was entitled to its value.

New-York, October, 1859.

NELSON, C. J. I. The court holds that the complainant was the owner of the steamship St. Lawrence, and of the one-third part or share of the steamship United States, and was the equitable owner of the steamship Ocean Bird, the legal title being in the defendant Richard Poillon (held as security for certain charges and claims of C. & R. Poillon), at the time of the execution of the bills of sale of these vessels from Graham and C.

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& R. Poillon, on the 5th of December, 1855, to the defendants Sheken and Meyer, as set forth in the pleadings.

II. That although these bills of sales are absolute on the face of them, they were executed and delivered as a security for a loan of \$100,000, made by Sheken and Meyer to Graham upon a usurious contract, in which was secured more than 7 per cent. for the forbearance of the loan, and that the contract and bills of sale executed in pursuance thereof are void in law and must be set aside.

III. That the said Graham is entitled to be restored to his interest in and possession of the said vessels, including the Ocean Bird, as it appears the incumbrances on the same to C. & R. Poillon have been discharged.

IV. But, inasmuch as it appears that the said Sheken and Meyer have sold and disposed of all their interest in the said vessels, and the said Sheken is thereby unable to restore them to the complainant, the said Graham is entitled to the value of the same.

V. It having been agreed, by the counsel of the respective parties, to use the evidence taken on the trial at law, in the case of *Graham agt. Meyer*, involving the validity of these bills of sale, of the title of the complainant to these vessels, and the transactions generally, out of which the present suit has arisen, as the proofs of the present case, we shall adopt the amount of the verdict of the jury in the case at law as the proper value, after the payments of advances and deductions voluntarily assented to be made by the complainant, and thus avoid the delay and expense of a reference to a master. The amount of that verdict is \$200,000, with interest from the 4th of May, 1856.

VI. That a court of equity has jurisdiction to administer the relief sought in this case.

Toll agt. Thomas.

SUPREME COURT.

ABRAHAM W. TOLL, assignee, &c., agt. JAMES THOMAS.

SAME agt. ROBERT BARNARD.

SAME agt. SILAS BROWN.

After the time, provided by § 332 of the Code, for bringing an appeal from the special to the general term has elapsed, the court—but not a judge at chambers—may, in its discretion, grant leave to the party, under § 174, to bring the appeal. (Approving the decision in the case of Haase agt. New-York Central Railroad Co., 14 How. 430;—other decisions examined.)

Albany Special Term, December, 1857.

MOTION for leave to appeal.

These actions were tried together before a referee. They involved the same legal questions. In each action the referee reported in favor of the plaintiff. Judgment was perfected, and written notice thereof was served on the defendant's attorneys on the 5th of October, 1857. The service was made by mail. On the first day of December, a notice of appeal in the *second* and *third* causes above entitled was duly served, but, through the misapprehension of the defendant's attorney, who had recently been substituted in the place of the attorney who had conducted the defence of the actions previously, no notice of appeal was served in the *first* above entitled cause, until the 7th of December, which was after the time allowed for appealing had expired. The plaintiff's attorney returned the notice.

The defendant in the last-mentioned action moved for leave to appeal, and the defendants in all the actions moved that proceedings in *two* of the actions be stayed until the decision of the general term in the *third* action.

JOHN K. PORTER, *for plaintiff.*PLATT POTTER, *for defendants.*

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HARRIS, Justice. The decision of this motion involves the question, whether, after the time allowed by the 332d section of the Code has elapsed, it is in the power of the court still to grant to a party leave to appeal. Upon this question a diversity of opinion has existed.

Upon this point I concur in the views expressed by Mr. Justice MARVIN, in *Haase agt. The New-York Central Railroad Co.* (14 How. 430).

By the 405th section of the Code, a judge at chambers may enlarge the time within which a proceeding in an action may be had, but the time for appealing is expressly excepted from this power. It is observable, too, that the power of the judge at chambers can only be exercised before the time allowed for taking the proceeding has expired. He can only *enlarge* time. He has no authority, in any case, to allow a proceeding to be had, after the time prescribed for such proceeding has expired. But there is no such restriction upon the court. The 174th section of the Code declares, that *the court* may allow an answer or reply to be put in, or *any other act* to be done, after the time limited for that purpose has expired. This power is general. No form of words could make it more so. Had it been intended to withhold from the court, as it had been withheld from a judge at chambers, the power to grant or enlarge time to appeal, it is reasonable to suppose that the same exception would have been found in section 174 that was inserted in section 405. The absence of any such restriction is very strong evidence that the legislature did not intend that it should be imposed.

In coming to this conclusion, I have not overlooked the case of *Enos agt. Thomas* (5 How. 361); nor the fact that it *purports* to be a general term decision. The case itself was properly decided, but the circumstances under which the opinion, as it now appears, came to be published, are such that I do not feel bound by its authority. It may have had the assent of its *ostensible* author, but, as I am informed, it was not submitted to the other judges who took part in the decision.

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In *Sherman agt. Wells* (14 *Howard*, 522), it is said that the court has no power to extend the time within which the party may appeal. But it is evident, from the report of the case, that the question was not considered, nor, in the view taken by the court of the question before it, was it necessary that it should be determined.

The affidavits upon which this motion is founded present a case which calls upon the court still to allow the defendant to appeal, if it has the power, and being satisfied that such power is conferred upon the court by the 174th section of the Code, this branch of the motion should be granted.

I am also of opinion that, upon perfecting the appeals in all the cases, and giving security as required by the 348th section of the Code, all further proceedings in *two* of the actions should be stayed until the decision of the court upon the appeal in the *third* action. The defendants in the other two actions should be required to stipulate to be bound by the decision so to be made. The plaintiff should also be allowed to elect which of the three actions shall be argued upon the appeal. The plaintiff is also entitled to the costs of this motion.

SUPREME COURT.

DAYTON, receiver, &c., agt. CONNAH.

It is necessary now, under the Code, as it was formerly in an action brought by a receiver, to state in the complaint *the time and mode of his appointment*, so that the adverse party may take issue on such facts.

New-York Special Term, October, 1859.

DEMURRER to complaint.

INGRAHAM, Justice. The plaintiff in his complaint describes

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himself as "having been duly appointed receiver of John W. Crane, and bringing this suit by order of the supreme court."

The defendant demurs, upon the ground that the plaintiff does not show any legal capacity to sue. In *Gillett agt. Fairchild* (4 Denio, 80), it was held, under the old system, that "it was necessary to allege in proper form that the plaintiff was appointed receiver," &c. Chief Judge BRONSON says: "It is a rule in pleading, that the time and place of every traversable fact should be stated, and it does not appear where the order was made by which the plaintiff was appointed receiver. The averment is, that the plaintiff was duly appointed receiver. Such an averment is not capable of trial. The plaintiff should have stated what in particular was done," &c.

In *Bangs agt. McIntosh* (23 Barbour, 596), this case was approved as giving the correct rule. In *Hobart agt. Frost* (5 Duer, 672), Justice DUER held, that the objection taken in this case could only be raised by demurrer as to the legal capacity of the plaintiff to sue.

The same rule was made necessary in *Hulbert agt. Young* (13 Howard, 418), in reference to a guardianship; and in 7 Barb. 206 it was said the plaintiff, when he sues as receiver, should state the place of his appointment, and distinctly that he was duly appointed by an order of the court. Alleging that he was duly appointed on such a day is not sufficient.

The principle of these cases was fully recognized and sustained by DENIO, J., in the court of appeals, in *White agt. Joy* (3 Kern. 88). He says it will not answer for a receiver merely to describe himself as receiver, or even under the former system to aver that he was duly appointed. He must set out the proceedings so that the court may see that the appointment of the receiver was legal.

From all the cases it appears necessary to state the time and mode of appointment, so that the adverse attorney may take issue on such facts. As no authority is submitted sustaining a contrary view, I conclude there are none.

Judgment for defendant on demurrer, with leave to plaintiff to amend on payment of costs.

UNITED STATES CIRCUIT COURT.

NELSON G. NETTLETON and others agt. THE SHIP FANNY
FOSDICK.

An article of merchandise (kerosene or coal oil), which is partially new as a commodity in the trade, and its effect upon other cargo, stowed in the same hold of a vessel, not well understood, *held*, that there cannot be applied to it such a clear and well known usage and custom, in respect to its *stowage* with other cargo, as will exempt the carrier within the principle of the case of *Baxler* agt. *Leland* (1 *Blatch*. 536).

But where it was alleged that a quantity of wheat had been damaged by the stowage of kerosene oil, in the presence of the wheat in the hold of the vessel, by which the wheat was impregnated with an offensive odor, so as to lessen its value 25 cents per bushel, and as to which there was a contrariety of evidence,

Held, that this wheat, on the discharge of the vessel, having been by the consignees mingled and blended with another portion of wheat, which was stowed between decks, and as to which there was no satisfactory evidence that it was affected by the disagreeable flavor of the oil, the libel against the vessel was properly dismissed.

New-York, October, 1859.

APPEAL from a decree dismissing libel.

NELSON, C. J. The libel was filed against the ship, to recover damages for the injury to a quantity of wheat shipped from New-Orleans to this port. The wheat (990 sacks, containing 2,306 bushels) was but on board the vessel in December, 1857, and arrived here January 10th, following. The Fanny Fosdick was a general ship, engaged in carrying general cargo, and had laden on board, with the wheat, flour, sugar, molasses, hides, oil, &c. When the wheat was discharged at this port, it is claimed that it emitted an offensive smell as if impregnated with the odor of kerosene or Breckenridge coal oil, of which some 750 barrels had been stowed in the hold of the ship. Two hundred bags of the wheat were stowed in the hold on barrels of flour, which rested on a ground tier of hogsheads of molasses. The wheat, however, was not within 20

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feet of the oil. The rest of the wheat was stowed between decks. The cargo was well stowed and properly cared for during the voyage, unless the stowage of the oil in the presence of the wheat affords evidence of bad and unskillful stowage and want of due care and caution in the transportation. The wheat, when discharged, in all other respects, except the offensive odor, was in fine condition. This smell, the witnesses state, reduced its value some 25 cents per bushel. The case upon the facts is peculiar.

There is considerable conflict of evidence upon the questions: 1, whether or not there was any stench or offensive odor emitted from the wheat when delivered? 2, whether, if in exposing it to the air a short time with proper ventilation, it would not have been removed? and 3, it is claimed to have been ascertained from actual shipments with assorted cargoes, that coal oil would not produce the effect sought to be established in this case. The solution, doubtless, of this contrariety of evidence may in part be found in the fact that the article of coal oil is partially new as a commodity in the trade, and its effects upon other cargo, stowed in the same hold of the vessel, not yet well understood. For this reason, we are not prepared to say that there can have been such a clear and well-known usage and custom, in respect to its stowage with other cargo, as will exempt the carrier within the principle of the case of *Baxter agt. Lelland* (1 *Blatch*. 536).

But there is another ground resting upon the facts in the case, upon which we think the libel was properly dismissed by the court below. The wheat was delivered from the ship in the sacks in lighters, and was discharged from them into the lighters, in bulk, mingling the portion stowed in the hold, which was in the vicinity of the oil, with the portion stowed between decks. The consignees are responsible for this blending the parcels, and we are not at all satisfied upon the evidence that the portion stowed between decks was affected by the disagreeable flavor of the oil, even if it had been otherwise in the portion stowed in the hold. And as it respects the 200 bags in the hold, in the conflict of the testimony we are not

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disposed to interfere with the decree. Indeed, we are inclined to think that, if some care had been bestowed in airing and ventilating the wheat, the offensive odor would have disappeared, and the damages slight, if any. A sample was brought into the court below, which the judge states, in his opinion, "clearly failed to show that it retained any discernible effects of the taint."

The decree of the court, dismissing the libel, affirmed.

SUPREME COURT.

JOHN MITTENBEYER agt. JACOB S. ATWOOD and others.

Although, in an action founded on a bill of exchange or draft, there is no right of action against the *drawees*, where on presentation they refused to accept, yet, if the complaint alleges that, on an accounting had between the drawers and drawees, there was left in the hands of the drawees, by the drawers, sufficient money to pay said draft, and which the drawees then agreed to pay to the holder, it is a cause of action on a promise made to a third person for a fixed consideration, and valid.

New-York Special Term, October, 1859.

DEMURRER to complaint.

INGRAHAM, Justice. If this action was founded on the bill of exchange or draft set out in the complaint, I think there could be no recovery against the defendants, Atwood & Co., thereon. They refused to accept on presentation, and, although inferred, their refusal gave the plaintiff no right of action against them.

In the complaint, the plaintiff, after setting out the bill of exchange and its presentment and refusal, and also that Atwood & Co. had the moneys in their possession, which they were directed by the drawers to apply to the payment of the bill, it also alleges that there was between the drawers of the draft

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and Atwood & Co. an accounting and settlement of their money transactions, and that on such accounting the drawers left in their hands sufficient money to meet and pay said draft on presentment, and which the said Atwood & Co. then agreed to pay the holders of the draft on presentment.

This, then, is a cause of action against a person on a promise made to a third person, for a fixed consideration, to pay such person money. Such promises have been held to be valid, and the foundation of an action by the person for whose benefit the promise was made. (*Weston agt. Banker*, 12 J. R. 276; *Schermerhorn agt. Vanderheyden*, 1 J. R. 139; *Shear agt. Overseers of Hillsdale*, 13 J. R. 496; *Judson agt. Gray*, 17 *Howard's Pr. Rep.* 289.)

I think the plaintiff's complaint contains a good cause of action.

Judgment for plaintiff on demurrer, with leave to answer, on payment of costs.

SUPREME COURT.

LUCAS PRUYN and JOHN BILLIS, Overseers of the Poor of Kinderhook, respondents, agt. ARCHIBALD B. TYLER, appellant.

An *appeal* under the Code from a *justice's judgment*, rendered in an action for a penalty for a violation of the excise law, under the Revised Statutes (*Tit. 9, Ch. 20, Part 1*), to the county court, does not *supersede* the justice's judgment; nor does the county court proceed *de novo* with the trial, as was the case on such an appeal before the Code.

Therefore, where the statute under which the action is brought is *repealed* pending the appeal to the county court, the justice's judgment is not affected by such repeal—it remains a fixed right.

Under the law of 1854, there is no prescribed manner or form of *making proof* before the justice that the overseers had neglected, for ten days after complaint made, to prosecute for the penalty under the Revised Statutes (*Tit. 9, &c.*);

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therefore, the *undertaking* given by the complainants to prosecute in the names of the overseers is sufficient evidence of such a fact. At all events, if the parties go to trial before the justice without making the objection, but conceding the fact, it will be too late to raise the question on appeal. Such evidence on that question, as will satisfy the justice, will give him jurisdiction. And so, the objection, that the offence was not proved to have been committed in the *town* specified, cannot be raised on the appeal, where it was not taken on the trial before the justice.

Albany General Term, March, 1859.

Present, HARRIS, GOULD and HOGEBOM, Justices.

THIS is an action brought to recover penalties for violation of the excise law (*Tit. 9, Ch. 20, Part 1, of the Revised Statutes*), by persons other than the overseers of the poor, in their names and title of office, upon giving the proper security, by virtue of chapter 285 of Session Laws of 1854.

The complaint claims for four violations of section 15, title 9, chapter 20, part 1st, of the Revised Statutes. The answer denies each and every allegation of the complaint, and pleads a compromise. The defendant appeared upon the joining of issue, and also upon the trial. The plaintiffs proved numerous violations of the statute and had judgment for \$100 and costs.

The defendant appealed to the county court, which affirmed the judgment, and he now appeals to this court. The important questions argued on the appeal will be found stated in the opinion.

CHARLES L. BEALE, *for appellant.*

HOES & BENTON, *for respondents.*

GOULD, Justice. I do not understand that there is anywhere prescribed any form or manner of proof that the overseers of the poor had not, during ten days after complaint made to them, instituted proceedings to recover the penalty claimed in this action. And, in the absence of any such prescribed form or manner, I presume that such evidence of the fact (whether oral or written), as is satisfactory to the justice of the peace who issues the summons, is sufficient to give juria-

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diction; and that if a defendant sees fit to inquire into that fact, he must, in some shape, take an issue as to the jurisdiction. And that not being done in this case, this court will not look up a defence, which might have been easily and perfectly answered before the justice. Although, were there a prescribed manner of making such proof, there is no doubt that a compliance with it must affirmatively appear. The undertaking (in the absence of any rule) is sufficient evidence of such a fact. The parties conceded it on the trial.

A similar answer is to be made to the defendant's point, that the security was not given before the summons was issued. The return of the justice says that it was; and the defendant, without moving to have the return amended—whether by altering this statement, or striking it out—should be concluded thereby, as on a traverse of an alleged error in fact. Besides, it is of consequence only to the town, that this security be given. The provision was not made for the benefit of the defendant, or to shield an offender against the law.

I do not understand that the nature of this action—that is, its being to recover the *penalty* imposed by a statute—requires any rule more strict than would any other civil suit, on such points. And that such an action, though for a penalty, is a *civil suit* there has been no doubt, since the elaborately argued and well considered case of *Atcheson agt. Everitt* (*Cowper*, 382); and this court, at its last term, expressly so held in the case of the *Board of Excise of Albany Co. agt. Classon* (17 *How.* 193). The summons is properly indorsed for the purpose of apprising the defendant of the ground of the suit. It is of no consequence to *him*, or his *rights*, that he should know that the names of the overseers were used under a particular provision of another act.

As to the point, that the offence is not proved to have been committed in the town of Kinderhook, the case was manifestly tried on the assumption and admission that Valatie was in the town of Kinderhook. And within a short period (in a case where the *Overseers, &c., of Waterford* were plaintiffs), this court has ruled just that point against a defendant.

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Neither this court nor the county court is the place to take such an objection. It belongs to the trial before the justice.

The only question upon which, at the argument, there seemed to be any chance for a doubt, is, whether the repealing of the statute has affected the judgment given by the justice in this cause. And this question involves the consideration of the effect of an appeal under the Code. No doubt, the cases cited for the defence would go far to show that, before the Code, an appeal to the county court, from a judgment rendered by a justice, would have put the suit in such a condition that a repeal of the statute, before trial in the county court, would have been an end of the suit—a complete bar. But it is to be observed that *that* appeal was a *supersedeas* of the justice's judgment, and the trial in the county court was a *trial de novo*, by jury, as if originally commenced in the county court (2 Rev. Stats., 3d ed., 258 to 264, §§ 190, 196, 197, 206, 214, 215, 216, 217, 220, 221), and may allow *new defences* to be put in (§§ 218, 219). And the decision in *Yeaton agt. The United States* (5 Cranch, 283) is placed on exactly that ground. And such is the ruling in *Conly, &c., agt. Palmer* (2 Com. 183).

The appeal under the Code (§ 351, &c.) is a totally different thing. It does not *supersede* the justice's judgment; nor does the county court proceed *de novo* with a *trial*. But the appellate jurisdiction is merely of *errors* in the court below; the judgment is merely of *affirmance* or *reversal*; and the whole proceedings are like those formerly had on *certiorari*. (See 2 Sandf. S. C. R. 634.)

Since, then, the *judgment* of the justice remains a valid judgment, it is manifestly a fixed right, and cannot be affected by the repealing act. (2 Com. 182.)

I should affirm the judgment of the county court.

HARRIS, J., concurred.

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SUPREME COURT.

ELIZABETH T. P. BEACH, administratrix, &c., respondent, agt.
THE BAY STATE STEAMBOAT COMPANY, appellants.

The statutes of 1847 and 1849, giving an action for causing death, were intended to regulate the conduct of corporations, their agents, engineers, &c., and of other persons, whilst operating or being *in this state only*.

Where the acts, neglect, and default complained of, which resulted in death, occurred out of this state, and within the jurisdiction of another state, although the plaintiff, as administratrix of the deceased, resided in this state—*held*, that these statutes (1847–9) did not intend to make those acts, neglect, and default the subject of the civil remedy given by them here; therefore the complaint showed no cause of action under these statutes—(*reversing the decision in this same case at special term, 16 How. 1*).

It is not to be presumed that the legislature intended, for the purposes of the civil remedy, to include any acts, neglects, or defaults, not intended to be the subjects of the criminal proceeding mentioned in these statutes. These acts, which create the remedy for the benefit of the widow and next of kin, *also create the wrong as to them*.

The common law gives a remedy for personal injuries or torts, whether direct or consequential. A party who has suffered a personal injury or tort in another state, and comes here, brings with him his cause of action, and can recover here, upon the presumption that the common law prevails in such other state, and he could have recovered there had the action been brought there. But there is no such presumption arising upon a special statute giving a remedy unknown to the common law.

New-York General Term, December, 1859.

Present, ROOSEVELT, CLERKE and SUTHERLAND, Justices.

THIS action is brought under the acts of 1847 and 1849, to recover damages resulting from the death of John C. Beach, caused by an explosion or escape of steam on board the defendants' steamboat, the Empire State, while on her passage from Fall River to the city of New-York, the said John C. Beach being a passenger on board of said boat.

The complaint alleges that the said John C. Beach was, at the time, a resident of the city of New-York; that the defendant is a corporation of Massachusetts; that the deceased paid

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his fare and took passage at Fall River for New-York; and that the explosion or escape of steam, which caused the death, took place through the wrongful act, neglect, and default of the defendants and their agents and servants.

The defendants demurred to the complaint substantially upon the ground that it is not alleged in the complaint, nor does it appear therefrom, that the act or acts complained of occurred within the state of New-York.

The judge at special term, in deciding the demurrer, assumed that the death, and disaster occasioning it, did not take place within the state of New-York; he, nevertheless, held that the action was well brought, and overruled the demurrer. (*See 16 How. 1.*)

DANIEL LORD, *for appellants.*

THOMAS H. RODMAN, *for respondent.*

By the court—SUTHERLAND, Justice. I think it is to be assumed, in deciding whether the demurrer is well taken, as was done by the judge at special term, that the explosion and death did not occur within the state of New-York.

If the place is material, and the pleading is ambiguous as to the place, the presumption should be against the party whose pleading it is. (*Cruger agt. Hudson River Railroad Co., 2 Ker. R. 201.*)

It necessarily results from the independent sovereignty of different states or nations, that the laws of one state or nation can have no force or effect without its own territorial limits, and within the territory of another state or nation, without the consent of the latter. Sovereignty is exclusive and absolute, except so far as it may be qualified by treaty or consent. If the legislatures of two states or nations could pass laws for each other, to be enforced, *proprio vigore*, within the territorial limits of each other, both nations would instantly cease to be sovereign. The passage of laws is the highest act of sovereignty. Each independent nation or country has the same right to pass laws. It necessarily follows, that the laws of a

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state or country "can have no intrinsic force *proprio vigore*, except within the territorial limits and jurisdiction of that country." (*Story's Const. Laws*, §§ 7, 8.)

In the United States, the sovereignty of the several states is modified by the constitution of the United States adopted by them, but, irrespective of the constitution of the United States, the several states are independent sovereignties with respect to each other and other countries, and the foregoing principle of the territorial limitation of legislative power or jurisdiction applies to them.

The well-known distinction between the *lex loci contractus* and the *lex fori*, and between transitory and local actions, taken and recognized in construing and enforcing laws, assumes and is founded on this state or national territorial legislative limitation. (4 *Cowen R.* 510, note.)

Personal injuries or torts are transitory, *et sequuntur forum rei*. (*Rafael agt. Develst*, 2 *W. Blackstone R.* 1058; *Mostyn agt. Fabrigas*, *Cowper R.* 161-176.)

A party who has suffered a personal injury or tort in another country or state, and comes here, brings with him his cause of action for the injury or tort, and, if he finds the party who committed the injury or tort in such other country or state here, can sue him here; but it is presumed that, in ordinary cases, he can do so only upon the ground that he brought his cause of action with him; that is, that the act or acts of the defendant, by which the injury or wrong was effected, were unlawful when and where committed; in other words, that the injury or tort complained of here was an injury or tort by the law of the country or state when and where committed.

In such cases, the courts of one country or state give a remedy upon the principle of comity for personal injuries and wrongs suffered in another; but they must be injuries or wrongs by the law of the state or country in which they were suffered.

The common law gives a remedy for personal injuries or torts, whether direct or consequential. In actions brought here for injuries or torts committed in another country or

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state, where the common law is presumed to prevail, the court here gives the common-law remedies for such injuries and torts, upon the presumption that the common law does prevail in such other country or state, and, therefore, that the plaintiff had a right of action or remedy there, for the injury or tort committed there.

To apply this principle to this case: if the explosion took place in the state of Massachusetts, and John C. Beach, the deceased, had survived the injuries, and had brought his action here, against any of the defendants' agents or servants, through whose default or neglect the explosion occurred, whom he could find here, he could have recovered here, upon the presumption that the common law does prevail in Massachusetts, and because, the common law prevailing in Massachusetts, he could have recovered there, had the action been brought there.

But John C. Beach did not survive the injuries; and this action is brought by his personal representative, under special acts of the legislature of this state, giving a right of action or remedy unknown to the common law, not for the injuries suffered by John C. Beach, but for the damages and pecuniary injuries resulting from his death, suffered by his widow and next of kin; damages and injuries not the subject of judicial cognizance or of legal redress by the common law; and for which, therefore, it is to be presumed, no action could be brought in Massachusetts.

It is quite immaterial whether those sections of the acts, giving this right of action, are penal or remedial.

The remedy, in fact, is an extraordinary one, unknown to the common law, created by the acts, for damages or injuries also created by the acts; for, in a legal or judicial sense, damages or injuries, for which there is no legal redress or remedy, are not damages or injuries. These acts, which create the remedy for the benefit of the widow and next of kin, *also create the wrong as to them.*

Assuming that the wrongful act, neglect or default, explosion and death, took place in Massachusetts, in the absence of

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any law of that state giving a remedy to the widow and next of kin, or for their benefit, in a legal sense they cannot be said to have suffered any wrong or injury from the act, neglect, or default, &c., unless the acts of this state, under which this action is brought, extended into and were in force in Massachusetts; for act or acts complained of as tortious and wrongful must be tortious and wrongful when and where committed; at all events, neither the return of the agents or servants of the defendants, through whose neglect or carelessness the explosion took place, into this state, nor the voluntary appearance of the defendants in this action, would make the act or acts committed in Massachusetts originally tortious, or give the widow and next of kin of the deceased the benefit of the remedy provided for by the acts of 1847 and 1849.

The learned judge, who decided this demurrer at special term, commences his opinion by saying, "It cannot be denied that one state or nation has a right to give its citizens redress for any personal injury committed without as well as within its territorial limits, when it obtains jurisdiction over the wrong-doer. This has always been recognized as the common law. Many, if not most of the actions instituted in our courts of justice are transitory and not local; and if the cause upon which any one of them is founded arose in Japan, it would be just as tenable as if it arose in the state of New-York."

I think the question raised by the demurrer in this case is not a question of legislative power, but a question of interpretation.

It is not a question as to the power of the legislature which passed the acts of 1847 and 1849, but as to the intent of the legislature in passing them. The question is not, whether the court has jurisdiction of the parties and of the cause of action, assuming the action to be for an injury or tort committed in Massachusetts, or without the political jurisdiction of the state; but the question is, whether the act or acts complained of, which caused the death of John C. Beach, and thus, consequently, the alleged damages for which the action is brought, were tortious by *these acts of the legislature of this state*, and did

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or could, in a legal sense, cause any damage or injury *to the widow and next of kin*, for which an action can be brought *under these acts of the legislature of this state*, assuming that the act or acts, negligence or default, complained of as causing the death of John C. Beach, were committed or occurred in Massachusetts, or out of this state, and within the jurisdiction of another state. In other words, I think the question raised by the demurrer is, whether it appears, from the complaint, that the plaintiff has a cause of action under the acts of 1847 and 1849? not whether the legislature of this state could have given him one; or, if he has one, whether the court has jurisdiction of it.

Now, it is very clear, that the general proposition stated in the opinion of the learned judge at special term, that a state or nation has a right to give its citizens redress for injuries committed without as well as within its territorial jurisdiction, where it obtains jurisdiction over the wrong-doer, however true, has little or no bearing on the question in this case, viewing that question as one merely of the interpretation of the acts of 1847 and 1849. Indeed, the learned judge, by stating that proposition, and the other immediately following it as to transitory actions, as bearing on the question in this case, would appear, at the very commencement of his opinion, to have assumed that the act or acts, negligence or default, complained of, as causing consequentially the injury and damages to the widow and next of kin, for which the action is brought, were tortious and did cause such injury and damages, under and by force of these special acts of the legislature of New-York; the very question in the case being, as I have before stated, whether the act or acts, &c., having been committed out of this state, and within another state, were, or could be tortious under and by force of these statutes of New-York, or did or could cause any injury or damage to the widow and next of kin, for which a remedy was intended to be given by these statutes.

"Every nation has an exclusive right to regulate persons and things within its own territory." (*Story's Conf. Laws*, § 22.)

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Irrespective of written constitutions, and of limitations which may be implied from the formation and frame of the government, the legislature of a state may be said to have sovereign power over persons and things within its territory. It would have the power of preventing foreigners, who had committed certain acts in their own country, from coming into the state. It would have power to prevent citizens of the state, who had committed certain prohibited acts in another country, from returning to the state.

If the legislature of this state should do so extraordinary a thing, as to pass a law giving the personal representatives of an Englishman, or of a Frenchman, who had been killed in a duel in his own country, a right of action here against the party killing him, for damages for the benefit of the widow and next of kin of the deceased, such law could of course only be enforced against the person, or property of the person committing the act, if he should happen to come into the state, or have property here; but if the party committing the act should choose to come into this state, and should be sued under the act, it would be difficult to say that the case would necessarily present a question of jurisdiction for the court.

Laws of this description, undertaking, in a certain way, to regulate the conduct of foreigners in their own country, under the penalty of being enforced on their coming into the country passing the laws, might present questions of war, but could not very well present questions of jurisdiction.

A nation may undertake to regulate by law the conduct of its citizens while abroad in another country, to be enforced on their return to their own country, but such laws are really consistent with the almost self-evident proposition, that the laws of one nation or state can have no force in the territory of another, without the consent of the latter. As a state or nation "has an exclusive right to regulate persons and things within its own territory" only, it is to be presumed, whatever power it may have to regulate the property and conduct of its citizens in the territory of another state or nation with the consent of the latter, or to be enforced only on persons and

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property within its own jurisdiction, that its laws are and were intended to be regulations for persons and things within its own territory only.

There is nothing in these acts of 1847 and 1849 which shows that they were intended to protect the lives of its citizens while out of the state—nothing to show that they were intended to extend to act or acts, neglects or defaults, committed or suffered in another state.

It must be presumed, I think, as the result of the general principles of the territorial limit of political jurisdiction, and of the force of laws before adverted to, that the statutes were intended to regulate the conduct of corporations, their agents, engineers, &c., and of other persons, whilst operating or being in this state only.

If a citizen of this state leaves it, and goes into another state, he is left to the protection of the law of the latter state.

One section of the law of 1849 is highly penal.

For the same wrongful act, neglect, or default, for which the statutes give the civil remedy to the personal representatives of the deceased, for the benefit of his widow and next of kin, the statute of 1849 renders the party who commits the act, &c., liable to indictment and imprisonment in a state prison.

Penal actions and proceedings are strictly local.

Can it be presumed that the legislature intended, for the purposes of the civil remedy, to include act or acts, neglects or defaults, not intended to be the subjects of the criminal proceeding?

Upon the whole, it is quite clear to me, that it was not intended by these statutes to make the act or acts, neglect or default, complained of in this case, which it must be assumed occurred out of this state and within the jurisdiction of another state, the subject of the civil remedy given by the statutes; and that therefore the complaint in this case does not show any cause of action under these statutes; and that the judgment at special term should be reversed; and that the defendants should have judgment on the demurrer.

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COURT OF APPEALS.

JAMES B. BRADY, appellant, agt. THE MAYOR, &C., OF THE
CITY OF NEW-YORK, respondents.

A contract made in violation of the requirements of the 12th section of the act of 1853, amending the charter of the city of New-York, establishing a system by which all work to be performed for the city, which shall amount to more than \$250, shall be subjected to public competition, and given to the lowest bidder, is null and void.

Where an ordinance of the common council required the street commissioner to state, in his advertisement for bids, the nature and extent, as near as possible, of the work required, and seven-eighths of the work was in removing a fixed rock, the rest was the laying of flagging or curb stone, and a form of inviting proposals and of awarding the contract was adopted, and so arranged that there was not only no competition as to the rock excavation, but so that it should be paid for at such price as the bidder chose to insert in his proposal, provided that, as to the other comparatively small portion of the work, he bid lower than any one else,

Held, it appearing that there was no difficulty in ascertaining the quantity of rock excavation with sufficient accuracy so as to expose it to a fair competition, that the proposal of the street commissioner, whose duties were prescribed by law, was in violation of the law and illegal on its face, and the plaintiff (the contractor) could claim nothing under it.

Although one who has *bona fide* performed labor under a contract which is void, from a failure to comply with the statute, may maintain an action against the city to recover a *quantum meruit*, where the work has been accepted by the city, and has gone into use for public purposes, yet the action of the common council, in confirming the assessment-roll which includes such work, is not an acceptance of it, and cannot help out the contract or aid the plaintiff. If a lawful contract has not been made by the proper officer, a resolution by the common council, who could not make the contract originally, cannot affect the plaintiff in any way. (*This decision affirms that of the superior court, S. C. 16 How. 432.*)

December Term, 1859.

THIS was an appeal from a judgment of the superior court. A full statement of the facts, the contract, &c., and the finding of the referee, will be found in the report of the case in that court (16 Howard, 432).

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A. J. WILLARD, *for appellant.*

A. R. LAWRENCE, JR., *for respondents.*

By the court—DENIO, J. The 12th section of the act of 1853, amending the charter of the city of New-York, established a system by which all work to be performed for the city, which should amount to more than \$250, should be subjected to public competition, and should be given out to the party who would undertake to do it for the smallest amount of money. It was based upon motives of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed. If executed according to its intention, it will preclude favoritism and jobbing, and such was its obvious purpose. It does not require any argument to show that a contract made in violation of its requirements is null and void.

We are, therefore, to determine whether the contract under consideration was made in furtherance of this policy, or in hostility to it, or, in other words, whether it was in conformity with the law or in violation of it. The work to be performed in Eighty-third street was in part the removing of a fixed rock; the rest was the laying of flagging or curb-stone. The rock excavation, according to the plaintiff's claim, was more than seven-eighths of the whole expense, and at any rate it was a substantial and important part of the work. A form of inviting proposals and of awarding a contract was adopted, but it was so arranged that there was not only no competition as to the rock excavation, but so that it should be paid for at such price as the bidder chose to insert in his proposal, provided that, as to the other comparatively inconsiderable portion of the work, he bid lower than any one else. A form of proposal which should have confined the competition in terms to the flagging and the curb, and of other work, and should have left the rock to be paid for by day's work, or at what it was worth, would have been fair upon its face, and would not have peculiarly exposed the city to imposition; and if it were practically impossible to subject the removing of the rock to competition,

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because the quantity could not be sufficiently ascertained, such a method of arranging the proposals might not have been objectionable. But it is not found by the referee, and was not proved on the trial, that there was an impossibility, or even any difficulty, in stating the quantity of rock excavation with sufficient certainty. Indeed, taking his conclusions of fact and law together, the fair construction of the finding is, that it could be determined with such approximate accuracy as would be essential to subject it to the competition required by the statute. It is found positively, as a matter of fact, that by the plan adopted the lowest bidder, upon the data given in the proposal, could not be ascertained. The conclusion of law stated is, that it was the duty of the street commissioner, under the charter and ordinances, to have stated, in his estimate or proposals, the amount of rock excavation which would probably be required in doing the work in question, and to have included it among the data by which his bids were to be tested. Unless the referee believed, upon the evidence, that it was susceptible of ascertainment to such a degree of certainty as to enable it to be stated among the data for testing the bids, he could not have come to these conclusions. But, I apprehend that we may say, from the knowledge of such matters which every man may be supposed to have, that the quantity could be ascertained with a sufficient approximation to accuracy as to expose it to a fair competition. The distance in length was only about 2,000 feet. It appears by the contract, that there was a profile in the street commissioner's office, which necessarily showed the conformation of the ground, and the grade of the street. The problem was, to ascertain whether rock existed in that portion of it which was above the grade, and to determine, by making so many incisions of the soil as might be necessary, its thickness from the top of the rock to the grade, and then to ascertain its quantity by calculation. No doubt it would require time, attention and care; but the same might be said of most acts which are really useful. The city had an officer in its pay (the surveyor), within whose functions such a duty would naturally fall. An ordinance of the

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common council required the street commissioner to state, in his advertisement for bids, the nature and extent, as near as possible, of the work required.

I cannot persuade myself that this was a case in which it was impossible or really difficult to ascertain and state, in the invitation for bids, that the work in question would require the blasting and removal of a quantity of fixed rock, and to give an estimate of the number of cubic yards sufficiently exact to enable persons, desirous of competing, to prepare with prudence and safety for each item of the work. If this had been done, and if the result of all the offers had been taken into the account in selecting the lowest bidder, a contract given to that person would have been awarded according to the statute. The successful bidder was here arrived at, by laying out of the account the bulk of the work in point of labor and expense, and testing the offers by the price proposed for an inconsiderable portion of it. The plaintiff claims under the act of a public officer, whose duties in this respect are prescribed by law. If, in doing it, he violated, as I think he did, the plain mandates of that law, the act was illegal, and the plaintiff can claim nothing under it.

The plaintiff offered to show, by the production of the original bids, that the plaintiff was not the lowest bidder according to the data given in the street commissioner's proposals, and the offer was rejected, unless proof of fraudulent collusion was also offered. The ruling was, I am inclined to think, erroneous. If it is not so, a contract might be given to the highest instead of the lowest bidder, and it would be of equal validity as though properly given. If it should be said that the contractor might not be cognizant of the illegality, the answer is, that he is entitled to be present when the bids are opened; and it is not unreasonable that he should see to it that he is by law entitled to the contract which is given to him. But it is not necessary to decide this point, and I prefer to place my opinion on the ground that the proposals of the street commissioner were illegal upon their face, in declaring that the suc-

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cessful bidder would be ascertained by a test which left out of view the principal part of the work.

It is not necessary to deny that one, who has *bona fide* performed labor under a contract which is void from a failure to comply with the statutes, may maintain an action against the city to recover a *quantum meruit*, where the work has been accepted by the city, and has gone into use for public purposes. The plaintiff objected to evidence as to the price of rock excavation, and it was excluded at his instance. If he was entitled to that measure of compensation, there should be a new trial, in order to enable its amount to be ascertained.

The action of the common council, in confirming the assessment roll, cannot aid the plaintiff, upon any principle with which I am acquainted. That body could not make the contract originally; and if a lawful one has not been made by the officer to whom that duty was committed by law, it cannot be helped out by any resolution of the council. The action has no force as an estoppel. It was between other parties, and did not affect the plaintiff in any way. It proves, perhaps, that the common council then supposed the city liable for this claim; but they have since decided to contest it, and our duty is to pass upon the defence which they have presented. I am in favor of affirming the judgment of the superior court.

SUPREME COURT.

JOHN P. HUNTER and another agt. DAVID D. LESTER.

Where, after *judgment* by default against the defendant, he moves to set it aside on the ground that no summons or complaint were ever served upon him, he will not be allowed a reference to ascertain that fact, where he does not swear to a full affidavit of *merits*. Merely swearing generally "that the note has been paid," is not sufficient.

The service of a summons, by the *plaintiff* in the action, is a mere irregularity which may be corrected by motion before, but not *after, judgment*. If the defendant desires to avail himself of the irregularity, he must move the first opportunity.

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Cayuga Special Term, January, 1860.

MOTION to set aside judgment and execution, for irregularity.

JOHN R. FRENCH, *for defendant.*

JOHN T. PINGREE, *for plaintiff.*

KNOX, Justice. On the first day of February, 1850, John P. Hunter, one of the plaintiffs, served upon David D. Lester, the defendant, at the town of Sterling, in Cayuga county, a copy of the summons and complaint in the usual manner. This affidavit of service was made April 27th, 1857. There is, on the back of the complaint, an affidavit of service made on the 5th day of February, 1850. This last affidavit is defective, in not showing where or how the service was made. On the said 27th of April, 1857, a judgment was entered in Cayuga county by default, against defendant, for \$271.68.

The above facts appear by the judgment-roll. On or about the 28th of September, 1859, an execution was issued on the judgment.

This motion is to set aside the judgment and execution on two grounds. First, that there never was any service in fact of the summons or complaint on the defendant; and, second, that if there ever was a service, it was made by the plaintiff himself, and that by such a service no jurisdiction was acquired.

The defendant swears that the summons never was served, but that on the first of February, 1850, when the affidavit annexed to the judgment-roll shows it was served at Sterling, Cayuga county, he, the defendant, was at Argyle, in the county of Washington; and the affidavits by John Lester and George W. Lester say, "they are very positive they saw Lester in Argyle, on the first of February, 1850."

On the other hand, there is John P. Hunter's affidavit, that he did serve the summons, on the first day of February, 1850, on defendant at Sterling; the affidavit of Robert P. Hunter, that he saw him that day in Sterling, as he and his brother went there for the purpose of serving the summons. The affi-

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davit of Robert Hume, who swears that he knows, from recollection and papers, that defendant was in Sterling on the first of February, 1850; the affidavit of Hoxie, Cooper and George T. Hunter, to the effect that the defendant was in Sterling on the first day of February, 1850.

I think there is no ground to doubt that the defendant is mistaken, and has forgotten that the summons was served upon him at the time and place stated. It is nearly ten years since the service was made, and he may well have forgotten the fact. Not so with the plaintiff, who made an affidavit of such service on the 4th of February, 1850, four days after.

Had the defendant made an affidavit of merits, or, when he swears generally "that the note has been paid," had he stated how, or where, or when paid, perhaps it would have presented a case where the court would feel justified in referring it to a referee to take proof, &c., as to whether the summons was served. But the defendant merely swears that "the promissory note upon which this action is founded has been paid, according to defendant's best knowledge and belief," and there are some facts stated in the affidavit which lead me to believe that the defendant, long before the judgment was entered up, did not claim that the note was paid, but only that it was "outlawed."

As to the second ground of the motion, the 133d section of the Code provides that "the summons may be served by the sheriff of the county where the defendant may be found, or any other person not a party to the action." I think the service of a summons by the party is a mere irregularity, which may be corrected by motion before judgment, but not afterwards. This was so held in *Myers agt. Overton* (2 Abb. 344), by Justice INGRAHAM. "The irregularity arises, not from the want of service, but from the mode of making it," is his language.

The defendant, if he desired to avail himself of the irregularity, should have made his motion at the first opportunity.

Motion denied, with \$7 costs of opposing.

SUPREME COURT.

THE PEOPLE agt. QUIMBO APPO.

If a court of *oyer and terminer* have the power to grant a new trial in any case (and the weight of authority seems to be in favor of such a power), it can only be on the ground that the court is not an *inferior court*, and the motion must be made before the *same court*, held by the same judge who tried the case.

There is no authority or power for a *subsequent* court of *oyer and terminer* to hear a motion for a new trial, where the trial was had before a different judge at a *previous court*, or to nullify the judgments and proceedings of such *previous court*.

By the constitution and the statutes, the court of *oyer and terminer* was organized an *independent court*, not continuing, as the other courts, with succeeding terms, &c., but merely continued as they had previously existed, for the purpose of disposing of the criminal business properly belonging to the supreme court, and terminating with all its powers at the time of its adjournment, without any right or authority in a succeeding court to review or change the proceedings and judgment rendered by any previous court.

New-York General Term, December, 1859.

Present, ROOSEVELT, SUTHERLAND and INGRAHAM, Justices.

THIS was an appeal from the decision at *oyer and terminer* of Justice ROOSEVELT, granting a new trial to the defendant. The reasons of the judge were given as follows :

ROOSEVELT, J. The prisoner Appo, a Chinaman by birth, was convicted at a court of *oyer and terminer*, held in April last, of the crime of murder. Sentence of death was pronounced upon him, but its execution was temporarily suspended, by the intervention of the governor, to enable the defendant to apply for a new trial. That application he now makes, at a different term of the court, on various grounds stated in the papers. The district-attorney objects to its being granted, first, because the court, as he insists, has no power ; and, second, because, in his view, the reasons alleged are insufficient.

After much examination and reflection, I have come to the conclusion that these objections are not well founded.

The oyer and terminer is the highest court of original jurisdiction in criminal cases. Although at one time, in the earlier periods of English history, a mere temporary commission, it has long since ceased to be so, and is now a permanent court of record, recognized in the constitution as an existing superior tribunal, over which a judge of the supreme court is to preside, but not, according to the language of that instrument, an "inferior court" to be established at will by the legislature, and to be abolished at any time by the same authority. And in a recent statute (chap. 72, § 1), passed in 1854, it is not only spoken of as having, like the supreme court, its regular terms, but—somewhat inaccurately, perhaps—as being "the court of oyer and terminer of this state." The Code, too, (§ 20), declares that there shall be, at least, two terms of the circuit court and court of oyer and terminer held annually in each of the counties, &c.

But although a continuous court, and not a temporary organization, dying at each final adjournment, it may still, it is contended, have no power to grant new trials.

In the case of *Carnel* (1 *Parker*, 256), decided in 1851, a motion for a new trial was entertained and was denied, not on the ground of want of power, although the point was raised, but on the ground of want of merits. In the case of *Morrison* (*same vol.* 625), three years later, the whole subject was elaborately discussed by Judge HARRIS, all the previous authorities being reviewed, and a new trial granted.

The practice in England, it may be conceded, is not to grant new trials in cases of felony, but to leave the party, however strong the evidence may be of his innocence, to an application for the royal mercy. Such a practice may, perhaps, be in harmony with the spirit of a monarchical government; but, in the language of our constitution, it is "repugnant to the government" established by us, and with all other parts of the common law of like character, and has been, on three successive occasions, "abrogated and rejected" by our people. (*Consti-*

tution of 1787, § 35 ; also Constitution of 1822, art. 17 ; also Constitution of 1846, art. 1).

There is no fitness in compelling a free citizen, if innocent, to sue for pardon. Pardon implies guilt. We may well imagine a case in which the supposed victim of an alleged murder should appear in full life after sentence of death had been pronounced against his supposed murderer. Shall it be said, under our system of law, that, with such newly discovered evidence staring it in the face, the court has no power to grant a new trial ? In the language of Judge HARRIS, "the most obvious principles of common justice require it." And, "upon authority," also, I concur in regarding the power of the court to grant a new trial, where the circumstances clearly call for it, "as established beyond all possible controversy." (*See the cases collected in 1 Parker, 627*).

The next inquiry, then, is, has a sufficient case been made to warrant the intervention of the court ?

Laying out of view, for I attach no importance to it, the affidavit of Twaddel, I think it quite clear, on the other papers presented, that the prisoner's poverty and his ignorance of our customs and institutions, natural to a Chinese subject, has deprived him of the benefit of substantial matters of defence, which, had they been presented, would, in all probability, have led to a different result—to a verdict of manslaughter instead of murder, if not to a verdict of acquittal.

By the court—INGRAHAM, Justice. A motion was made in a court of oyer and terminer, held after that in which the prisoner was tried, convicted, and sentenced, for a new trial upon the merits. No error of law was alleged, but the motion was founded upon matters appearing on the trial.

The justice who held that court decided to grant a new trial, upon the ground that the prisoner's poverty and ignorance of the customs and institutions of the country had deprived him of the benefit of substantial matters of defence, which, had they been presented, would, in all probability, have led to a verdict of manslaughter, if not to an acquittal.

That these reasons were very proper ones to be submitted to the executive for a pardon or a commutation of the sentence, will be denied by no one; but it may well be doubted whether ignorance of the institutions of the country ought in any case to be considered a sufficient cause for granting a new trial in a criminal case, after a fair trial has taken place, and the court before which the prisoner was tried has finally passed sentence on the prisoner, and closed its business. The same reason urged in this case might be used in very many of the criminal cases constantly occurring in our criminal courts. If it was sufficient cause on the first trial and conviction, I see no reason why it should not be equally availing after a second or third conviction, unless it was made to appear that the prisoner, during the time which may elapse between the different trials, had been instructed in the customs and institutions of the country, so as to render him more responsible for the results on a second trial than he was on the first. Sympathy for the prisoner under these circumstances, and pity for his condition, may well be exercised, but should not have the effect of producing an evil in the administration of criminal justice which would be attended with far greater evil than could in anywise result from a necessary appeal to the pardoning power in any individual instance. It becomes, therefore, a question of great importance to decide, whether a new trial for such a cause can be granted by a subsequent court of oyer and terminer in a case which was not tried in that court.

The district attorney moves for a writ of prohibition to the justice holding the court before which the motion was made, directing him not to proceed in granting such new trial.

The decision of this application rests merely on the question, whether the various courts of oyer and terminer, held in each judicial district, are to be considered as different terms of one continuing court; or different courts, each complete in itself; or mere adjuncts to the supreme court, in carrying into effect the powers which that court has, in regard to the disposition of criminal cases which may come before it.

A slight examination of the constitution of these courts in
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England will show that there they are not continuing courts. Originally, the commission to hold an oyer and terminer was only issued when some special offence had been committed, and the court was only held for the trial of that particular case. Afterwards, their powers were so enlarged by the commission, as to authorize the court to hear and determine all matters, &c., then undetermined; and so strict was the rule, as to the powers of the court, that it was held that they could only try such cases as were before them on indictments found while the court was in session. (*See 1 Chitty's Cr. Law*, 104; *4 Black. Com.* 290.) This difficulty was remedied by statute in England, and has been also provided against here, by allowing the court to entertain jurisdiction over indictments sent from the sessions.

The oyer and terminer there was less extensive in its jurisdiction than that of the commission of general jail delivery, which allowed the trial of cases whenever the indictment was found, if the prisoner was in confinement. The distinction in this country has not been observed between these courts; but, until the adoption of the constitution of 1846, the powers of the court under either commission were always united under the common title of courts of oyer and terminer and general jail delivery.

The latter part of the name appears to have been dropped since that time, both in the constitution and statutes, and these courts have, since that time, been known as courts of oyer and terminer; but, as they are continued merely by the constitution and statutes, the change in the name would not be held as in any way altering the powers and jurisdiction of the court, and the powers formerly possessed by both are now specially granted to the oyer and terminer. (2 *R. S.* 205.)

In England, the oyer and terminer originally had both civil and criminal jurisdiction. In the introduction to *Sellon's Practice* (Vol. 1, p. 70), in regard to this court it is said, that the records are made up in the king's bench, and go down to be tried in the proper county before the itinerant justices, after which they are returned back to the higher jurisdiction, with

the verdict, for the purpose of entering up judgment, and carrying that judgment into execution.

In the history of the judicial organization of this state, by Judge DALY, in the first volume of *E. D. Smith's Reports*, a reference is made to an act of the colonial legislature in 1691, establishing a supreme court in New-York, with all the jurisdiction of the courts of England.

By this act, it is said, the court of oyer and terminer was abolished, but, in conformity to the organization of the courts of Westminster, *its name was retained to designate the criminal circuit of the supreme court.*

From this organization of the supreme court sprang the court which ever since has been known in this state under that name, and with the court has at all times been united a circuit and an oyer and terminer, doing the civil and criminal business of the court whenever an inquiry into facts with the aid of a jury was necessary, modified at times by statutes, but still retaining the same distinctive features which were seen in the court as originally established.

By the act of 1818 (1 *R. Laws*, p. 335), which law was a revival of laws previously in force, circuit courts were directed to be held in each of the counties of the state, and by the eighth section provision is made for the adjournment of such circuit court, if the justice should not be present on the first day; and it also directs that the oyer and terminer, which shall be held at the same time and place, shall be likewise adjourned; and if the justice did not appear on the second day, all persons bound to appear at that court should be bound to appear *at the next court* of oyer and terminer to be held in that county. It is here spoken of as another court, and not as a term of the same court.

The fifteenth section directs who are to hold the courts of oyer and terminer, and the sixteenth makes it the duty of the district attorney to issue precepts to bring the business of the oyer and terminer at the next circuit court, as soon as may be after the circuit court is appointed.

An examination of this act will show clearly that both

courts were to be commenced together, and were to be continued as long as the justice holding the same should think to be necessary; and authority was also given to continue the oyer and terminer for so long as might be necessary to dispatch the business of the court. The circuit court was required to return the proceedings to the supreme court, and the oyer and terminer were to hear and determine all matters triable before them, and to deliver the jails of the prisoners according to law.

And for this purpose the sessions were directed by statute (2 *R. Laws*, p. 156) to send all indictments, not tried before them, to the next court of oyer and terminer, which court was to remit to the sessions if not tried at this court.

It is apparent, from these provisions, that neither the circuit nor the oyer and terminer was, by this act, to be a court continuing any longer than during its session. The oyer and terminer was to dispose of all its business, either by hearing and determining the indictments found, or by remitting to the sessions such as were not tried; and for this object the act provided that the court should continue until all the business before it was disposed of. The constitutions of 1777 and of 1822 did not provide for any new court in the place of the supreme court, circuit, or oyer and terminer, but provided for continuing to the judge of the supreme court the powers theretofore possessed in those courts.

The constitution of 1846 more particularly continues those courts, and, in the 14th article, section 5, speaks of the courts of oyer and terminer thereby established. The powers, however, of the courts remain the same.

By the 9th section of the 6th article it is provided "that the times and places of holding of the *terms* of the court of appeals, and of the general and special terms of the supreme court within the district, and the circuit courts and courts of oyer and terminer within the several counties, shall be provided by law." It provides for the terms of the court of appeals and of the supreme court, but makes no provision for the terms of the oyer and terminer, but only for the time of hold-

ing the courts. The provision as to the justice to hold the courts, is equally distinct. The justices of the supreme court may hold terms of the supreme court, and may preside in the courts of oyer and terminer.

If the court was a continuing court, there would not be courts of oyer and terminer in a county, but one court having different terms; but the constitution, while using the word "terms" as applicable to the supreme court, omits the use of that word in connection with the courts of oyer and terminer.

By the act of 1847 (*chap.* 280), courts of oyer and terminer, after the adoption of the constitution, were continued with the same powers and duties, and the same provisions, so far as was consistent with the constitution and that act.

In the direction to the district attorney, in section 37 of that act, to issue a precept to the sheriff to summon a jury, it refers to the court then next to be held, or any other court of oyer and terminer, and not to succeeding terms of the same court.

All these provisions, and many others that might be enumerated, would be unnecessary, if the various courts of oyer and terminer, held in the same county, were to be considered but one court. The business could be continued from term to term, there would be no need of remitting indictments to the sessions, and no new commission for an oyer and terminer from the governor would be required, but only an additional term of a court then in existence.

By the Code, the governor is authorized to appoint extra terms of the supreme court, and extra circuits and courts of oyer and terminer.

It will not be contended that the circuit court is an independent court, having separate terms, and yet the same provisions of law apply to that court as are used in regard to the oyer and terminer, and the former might with as much propriety be called a separate court as the latter.

It is true that, in some statutes of late, the word "term" has been used in referring to the oyer and terminer. In some cases this power of expression has been used evidently with-

out any regard to the organization of the court, and only in reference to the time of the sitting of the court.

I should not suppose such an expression could ever be considered as sufficient to warrant a change in the organization of the court, if it was not consistent with the previous powers of the court.

From this examination of the provisions of law, as applicable to this court, I am led to the conclusion that it was not the intention of the framers of the constitution, or of the statutes, to organize an independent court, continuing, as the other courts, with succeeding terms, &c., but merely to continue the courts of oyer and terminer as they had previously existed, for the purpose of disposing of the criminal business properly belonging to the supreme court, and that each court terminated in all its powers at the time of its adjournment, without any right or authority, in a succeeding court, to review or change the proceedings and judgment rendered by any previous court of oyer and terminer.

There are some cases in which the power of the court to grant new trials has been discussed, and the contradictory decisions on this point leave the question still undecided. In *The People agt. Stone* (5 *Wend.* 39), it was held that the court of oyer and terminer could grant new trials upon the merits.

In the same case (9 *Wendell*), it was held, that the court might vacate an order made at a previous court to quash an indictment. This was done, however, to permit the district attorney to make up and file a record, and the order was one made before judgment.

In *The People agt. Comstock* (8 *Wend.* 549), it was held, that the court could not grant a new trial. That was, however, a case of acquittal; and whether the oyer and terminer had power to entertain the motion for a new trial on behalf of the defendant was not considered.

In *The People agt. The Judges of Dutchess Oyer and Terminer* (2 *Barb. S. C. Rep.* 282), it was expressly held, that the oyer and terminer had not the power of granting new trials. This decision was by the general term of the second district, and was

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based upon the holding that the oyer and terminer was an inferior court, and therefore could not grant a new trial.

In *The People agt. Morrison* (1 *Parker Cr. Rep.* 625), Mr. Justice HARRIS held, that the court possessed the power of granting new trials. In this case the motion was made before the same court at an adjourned day, and there is no reason to suppose that it was not also decided before the same court.

And in *The People agt. Goodrich* (3 *Parker*, 518), Justice BALCOM expressed the opinion that the court had power to grant new trials, but it was not necessary to the decision of that case, as the court denied the motion upon other grounds.

The contradictory opinions expressed in these cases show that the question is by no means settled by adjudication. I do not see in them anything, however, irreconcilable with the views I entertain on the question now before the court.

In no one of the cases does it appear that the motion was made to a subsequent court held by a different judge.

In all of them it is fair to presume, from the statement of the cases, that the motion was made at the same court in which the trial had taken place.

Conceding, therefore, that the weight of authority is in favor of the power of the court to grant a new trial, and this can only be on the ground that the court is not an inferior court, still, the question remains open whether a subsequent court can exercise the power. I am of the opinion, that the court cannot thus nullify the judgments and proceedings of a previous court.

The motion for the writ should, therefore, be granted.

COURT OF APPEALS.

THEODORE T. EDGERTON, respondent, agt. ALBERT W. PAGE,
appellant.

Where a tenant remains in possession of the entire premises, his obligation to pay rent continues, and a defence of eviction is not available in extinguishment or suspension of the rent.

Where, in an action upon a lease for rent, the defendant—the tenant—set up in his answer a series of injuries to the premises during the term for which rent was claimed, caused by the wrongful acts of the plaintiff—the landlord,—held, that such injurious acts were entirely independent of the contract of leasing, and were not connected with the subject of the action, and could not, therefore, be interposed as a counter-claim. (*This decision affirms that of the New-York common pleas, S. C. 14 How. 116.*)

December Term, 1859.

THIS action comes before this court on appeal from the judgment of the general term of the court of common pleas for the city and county of New-York.

The action was brought to recover a quarter's rent of the premises No. 8 Fulton street, in the city of New-York, becoming due for the quarter ending May 1st, 1855, at the annual rate of \$1,500. The complaint alleged, in general terms, the hiring under a written agreement for one year from May 1st, 1854, *with the privilege of one more year*, and entry and occupation under the lease. The answer set out the lease in *hæc verba*, which imposed certain restrictions upon the use of the premises; and then alleged that the privilege of renewal was one of the chief causes of its value. The answer then proceeded to set out divers causes of injury to the defendant, the circumstances, and the extent of the injury.

The plaintiff interposed a demurrer to the answer, assigning the causes *serialim*. The issues of law were first heard at a special term of the court of common pleas (Judge BRADY presiding), which court overruled the demurrer, with leave to the plaintiff to reply, &c.; rendering judgment to that effect. The plaintiff appealed to the general term of that court, which court reversed the judgment of the special term, and ordered judgment absolute for the plaintiff. From this judgment an appeal has been brought by the defendant to this court.

In the judgment of reversal, INGRAHAM and DALY, JJ., concurred, and BRADY, J., dissented. The opinion of BRADY, J., at special term, will be found published in 12 *How. Pr. Rep.* 58; and the opinions of all three judges, at general term, will be found in 14 *How. Pr. Rep.* 116.

JOHN GRAHAM, for appellant.

I. A wrongful eviction of the tenant by the landlord from a part of the demised premises, suspends the rent (i. e. of the whole) until the possession is restored. (*Christopher agt. Austin*, 1 Kern. 216).

II. The landlord cannot recover, on the agreement to pay rent, a portion thereof, or any compensation for the part of the premises occupied by the tenant, while such eviction continues.

"The consequence of an eviction from part is not merely a discharge of the tenant from the rent, provided he abandons the residue (of the demised premises), but it is a discharge of the tenant from any rent or liability for the occupation of the residue during the term of hiring." (*Per PARKER, J., Christopher agt. Austin, supra*).

In other words, when an eviction occurs, the tenant can abandon the premises, and so annul his obligation to the landlord altogether; or else, if he remains, the rent is suspended during the continuance of the eviction, subject to a revival of the tenant's obligations when it has terminated, and the possession has been restored. In the case in hand, the answer shows that the eviction commenced with and lasted through the entire quarter for which rent was claimed. To render eviction from the premises a valid defence, it must have taken place before the rent became due. (*Giles agt. Comstock*, 1 Kern. 270, 275.)

III. *The beneficial enjoyment of the premises is the consideration for the obligation to pay rent.* A deprivation of this consideration is an eviction. (*Christopher agt. Austin, supra*, approving the language of SPENCER, senator, in *Dyett agt. Pendleton*, from which Judge DALY dissented).

IV. If the landlord creates or connives at the nuisance which divests the tenant of the beneficial enjoyment, or if he has any connection whatever with the nuisance, he loses his right to the rent. (*Gilhooley agt. Washington*, 4 Comst. 217).

V. The answer shows that the defendant intended to, and would have availed himself of the privilege of renewal in the lease, and so the plaintiff well knew. *The legal effect of this is to make the lease a demise for two years—as much so as though*

it had been executed for that period at first. (*Chretien agt. Doney*, 1 Comst. 419; *Pugsley agt. Aikin*, 1 Kern. 494).

So far as the plaintiff was concerned, *he had created a term for two years*. It was the defendant's right to shorten the term, and make it into one year. Affirming the lease, as the defendant did, as a lease for two years, he is to be regarded as having abandoned the demised premises in the middle of his term, compelled to do so by the plaintiff.

VI. The matter of the answer was not only competent as a bar to a recovery, but also as a ground of counter-claim. (*Code of Procedure*, § 150).

Judge DALY's views upon this point will be found from fol. 78 to 85 of the return; Judge INGRAHAM's, at folios 89, 90. Their error consists in likening this case to one of a single isolated trespass on the part of a landlord against his tenant. There is hardly more connection between such a case and this one, than there would be between an assault and battery by a landlord upon his tenant, and the obligations of a landlord under his lease. There can be no doubt but that, in an action for rent upon the latter, damages for the former could not be made the subject of counter-claim.

This case falls directly within *Gilhooley agt. Washington, supra*. It presents a nuisance or annoyance commensurate with the term for which rent is claimed, originating with the landlord and his agents or servants, and completely annihilating the beneficial enjoyment to which the tenant was entitled under the lease.

1. The ground of counter-claim arises *out of the contract or transaction set forth in the complaint*. All the cases show that there is an implied obligation on the part of the landlord to abstain from such an interference with his tenant. He must neither spread his annoyance to the premises occupied by his tenant, nor must he use his own premises to the prejudice of the latter. This duty grows out of the very relation of landlord and tenant.

2. The subject of the counter-claim is *connected with the subject of the action*. The subject of the action is the alleged agree-

ment of the defendant to pay rent. The subject of the counterclaim is the duty of the landlord (the plaintiff) not to deprive the defendant of the beneficial consideration for which he undertakes to pay rent. Are not these two subjects connected? Do not the duties of the plaintiff and defendant go together?

WINCHESTER BRITTON, *for respondent.*

First. There is no allegation in the answer which shows that the injury complained of resulted from any fault of plaintiff.

For—

I. Nothing appears, showing that the evil complained of did not result from the improper condition of that portion of the pipes upon defendant's premises, which was used by him (such pipes being common to both), there being no allegation that these pipes were *exclusively* used for account of the premises of plaintiff.

II. It does not appear but that the condition of the pipes actually existed when the tenancy commenced, and suffering it so to continue would be no eviction, nor would it constitute any basis for recoupment or set-off, or even an affirmative cause of action, there being no express covenant to repair in the lease, and none can be implied. (*Speckels* agt. *Sax*, 1 *E. D. Smith's Rep.* 258; *Eltheridge* agt. *Osborn*, 12 *Wend.* 529; *Taylor's Landlord and Tenant*, §§ 827, 843.)

Second. Defendant cannot claim a reduction of the rent for any act of mere *trespass* by the landlord, diminishing his beneficial enjoyment of the premises, not constituting an eviction.

For—

I. The damages alleged do not arise out of the contract or transaction between the parties, nor are they connected with the subject of the action, and the acts complained of are as independent of the contract or transaction between the parties as any trespass or other act of force committed by a stranger upon the tenant. The landlord's duty, claimed to have been violated, did not arise out of any contract between the parties, but that which the law imposes upon every member of community. Damages for a wilful trespass by the landlord upon the tenant,

cannot be the subject of set-off against a claim for rent, nor can damages for a trespass, *not constituting a breach of the contract declared on*, be recouped; nor are they the subject of a counter-claim. (*Cram agt. Dresser*, 2 *Sandf. S. C. R.* 120, 127; *Levy agt. Bend*, 1 *E. D. Smith*, 169; *Drake agt. Cockcroft*, 10 *How. Pr.* 377; *Mayor of New-York agt. Mabie*, 2 *Duer*, 411.)

II. There is no breach of the contract declared on, as the implied covenant for quiet enjoyment is at most only a warranty of possession under title in the lessor, and that the tenant shall enjoy such possession undisturbed (*See Woodfall's Landlord and Tenant Law*, 318), and is not broken by a trespass, but by an eviction only, or by an entry under an assumption of title. (*Holden agt. Taylor, Hobert*, 12; *Levi agt. Stephenson*, 5 *Bing. N. C.* 183; *Woodfall's Landlord and Tenant Law*, 412; *Waldron agt. McCarty*, 3 *John.* 472; *Kertz agt. Carpenter*, 5 *id.* 121; *Etheridge agt. Osborn*, 12 *Wend.* 529; *Watt agt. Coffin*, 11 *John.* 495; *Levi agt. Bend*, 1 *E. D. Smith*, 169; *St. John agt. Palmer*, 5 *Hill*, 601; *Drake agt. Cockcroft*, 10 *How. Pr.* 377; *Dart's Vendor and Purchaser*, p. 367, note; *Mayor of New-York agt. Mabie*, 3 *Kernan*, 151).

Third. There are no facts alleged showing any entry, under an assumption of title, by the landlord, nor an eviction, but, on the contrary, the answer shows there was no eviction; for—

I. While it is admitted that if a tenant is evicted by the landlord from any part of the demised premises, the obligation, under the lease, to pay rent, ceases, and though the tenant occupy the residue of the premises, yet he incurs no liability for rent therefor under the lease, as such eviction debars the recovery of any rent until the possession of the whole premises is restored. (*Smith agt. Raleigh*, 3 *Campbell*, 513; *Lewis agt. Payne*, 4 *Wend.* 423; *Terle agt. Terle*, 24 *Wend.* 76; *Lawrence agt. French*, 25 *Wend.* 453; *Dyett agt. Pendleton*, 8 *Cow.* 781; *Hegeman agt. McArthur*, 1 *E. D. Smith*, 147; *Christopher agt. Austin*, 1 *Kernan*, 216; *Taylor's Landlord and Tenant*, pages 183, 184).

II. And, while under the authorities, it may also be admitted that an actual entry and physical expulsion is not

necessary to constitute an eviction; that it is enough that there is an interference by the landlord with, or a disturbance of, the tenant's possession, depriving him of the beneficial enjoyment or use of the demised premises, rendering their further occupation impossible, or injurious beyond pecuniary computation and compensation. (*Dyett agt. Pendleton*, 8 Cow. 727; *Ogilvie agt. Hull*, 5 Hill, 52; *Cohen agt. Dupont*, 1 Sandf. S. C. R. 260; *Taylor's Landlord and Tenant*, p. 443; *Cram agt. Dresser*, 2 Sandf. S. C. R. 120; *Campbell agt. Shields*, 11 How. Pr. 565; *Gilhooley agt. Washington*, 4 Comst. 217),

III. Yet, such interference or disturbance produces no eviction before the tenant leaves the premises. The tenant cannot be evicted and still occupy. To suppose that he can, involves an absurdity and a contradiction in terms. He must be put out of possession, *expelled from* either a part or the whole. (*Hunt agt. Cope*, Cowper, 242; *Reynolds agt. Buckle*, Hobart, 326; *Jones agt. Boddington*, Comberbach, 380; *Burhall agt. Lechmere*, 1 Raymond, 370; *Buller's Nisi Prius*, 177; *Salmon agt. Smith*, 1 Wm. Saunders, 204, n. 2; *Harrison's Case*, Clayton, 84; *Rohrer agt. Seyd*, T. Jones, 148; *Page agt. Parr*, Styles, 432; *Cibels agt. Hills*, 1 Leonard, 110; *Arnold agt. Fort*, 3 Keble, 453; *Wilson agt. Smith*, 5 Yerger, 399; *Jackson agt. Eddy*, 12 Missouri, 209; *Cowie agt. Goodwin*, 9 Carr. & Payne, 378; *Dyett agt. Pendleton*, 8 Cow. 727; *Cram agt. Dresser*, 2 Sandf. S. C. R. 120; *Campbell agt. Shields*, 11 How. Pr. 565; 3 Kent's Com. 464; 4th ed., note (7th ed., 574, note); *Gilhooley agt. Washington*, 4 Comst. 217; *St. John agt. Palmer*, 5 Hill, 599; *Bennett agt. Bittle*, 4 Rawle, 339. Also, other cases cited in opinion of DALY, Judge, in court below.)

The true doctrine in this state, established by authority, is simply this: When there is an actual expulsion from the possession of the premises, or from any portion thereof, or such an interference with the beneficial enjoyment as to justify the departure of the tenant, and he abandons the possession before the expiration of his term, there is an eviction; but, where there is simply an intrusion upon the premises, or a destruction of property thereon, or an injury to the enjoyment result-

ing from molestation or disturbance, the tenant still retaining entire possession, there is only a trespass. *Dyett agt. Pendleton*—which is the leading case sustaining constructive eviction, and has gone to the verge. (See *Ogilvie agt. Hull*, 5 *Hill*, 52, and *Gilhooley agt. Washington*, 4 *Comst.* 219, 222),—decides no more than is laid down in the above proposition. (See *Jackson agt. Eddy*, 12 *Missouri Rep.* 209). General language, when used by the court, must always be understood with reference to the subject then before it. No case of eviction can be found reported where the tenant was not deprived of the possession of the demised premises, or some portion thereof. In *Dyett agt. Pendleton*, the tenant left; and the reported opinions of the respective members of the court show that the question before the court was not whether a tenant could be evicted from, and retain possession of, the entire premises, but whether he could be evicted without an actual entry and actual expulsion? (*Opinion of SPENCER*, pp. 728, 734; *opinion of CRARY*, pp. 735, 739).

By *constructive eviction* is meant *eviction by constructive entry and force*, as contradistinguished from actual, physical entry and forcible expulsion, and relates to the manner in which the expulsion or eviction is accomplished, and not to the fact whether or not it was accomplished at all.

IV. The tenant in this case did not leave until after the expiration of the term; and, by the terms of the contract, the rent had fallen due, and abandoning at such a time could constitute no bar to an action for the rent for that term. (*McCarty agt. Hudson*, 24 *Wend.* 293; *Cohen agt. Dupont*, 1 *Sandf. S. C. R.* 364; *Whitney agt. McKeon*, 3 *Denio*, 452; *Lafarge agt. Halsey*, 1 *Bosw.* 171).

V. But if defendant had left, there would in this case have been no eviction. There was no interference with the possession, and no disturbance of the beneficial enjoyment, not entirely capable of computation and compensation in damages as for any trespass. There was no expulsion, either moral or physical, and a mere molestation or disturbance constitutes no

eviction. (*Carpenter agt. Parker*, 91 *Eng. Com. Law Rep.* 205, 242).

Fourth. No damage can be claimed or recouped for breach of covenant of renewal, for there is no allegation of a demand, or refusal, to renew. Besides, if plaintiff had actually driven defendant from the premises at the time alleged, it would have been no answer to an action for rent for the preceding term. (*Etheridge agt. Osborn*, 12 *Wend.* 529; *Kessler agt. McConachy*, 1 *Rawle*, 435; *Giles agt. Comstock*, 4 *Comstock*, 270; *Lafarge agt. Halsey*, 1 *Bosw.* 171).

GROVER, J. The demurrer presents two questions: 1st. Whether the facts alleged in the answer constitute a defence? 2d. Whether they constitute a counter-claim, available to the defendant by way of recoupment or otherwise, in this action? The rule has long been settled, that a wrongful eviction of the tenant by the landlord, from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof until the possession is restored. (*Christopher agt. Austin*, 1 *Kern.* 217). Whether this eviction must be actual, by the forcible removal of the tenant, by the landlord, from the demised premises or a portion thereof, was not settled in this state until the case of *Dyett agt. Pendleton*, (8 *Cow.* 728.) In that case the principle was established by the court for the correction of errors, that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of the rent was barred, although the lessor had not forcibly turned the tenant out of possession. Ever since that case, this has been considered as a settled rule of law binding upon all the courts of this state. Such acts of the lessor, accompanied by an abandonment of the possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent. The reason of the rule is, that the tenant has been deprived of the enjoyment

of the demised premises by the wrongful act of the landlord, and thus the consideration of his agreement to pay rent has failed.

In case of an eviction from a portion of the premises, the law will not apportion the rent in favor of the wrong-doer. In this case, the answer shows that the defendant continued to occupy the premises for the whole time for which the rent demanded accrued. In this the case differs from *Dyett agt. Pendleton* (*supra*). I cannot see upon what principle the landlord should be absolutely barred from a recovery of rent, where his wrongful acts stop short of depriving the tenant of the possession of any portion of the premises. The injury inflicted may be to an amount much larger than the whole rent, or it may be of a trifling character. In all the cases where it has been held that the rent was extinguished or suspended, the tenant has been deprived, in whole or in part, of the possession by the wrongful act of the landlord, either actually or constructively.

There is no authority extending the rule beyond this class of cases. It would be grossly unjust to permit a tenant to continue in the possession of the premises, and shield himself from the payment of rent by reason of the wrongful acts of the landlord, impairing the value of the use of the premises to a much smaller amount than the rent. This must be the result of the rule claimed by the defendant. The moment it is conceded that the injury must be equal to the amount of the rent, the rule is destroyed. It would then only be a recoupment to the extent of the injury. In *Ogilvie agt. Hull* (5 *Hill*, 52), NELSON, Chief Justice, in giving the opinion of the court, says "that no general principle is better settled or more uniformly adhered to, than that there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession, depriving the tenant of the beneficial enjoyment of the demised premises, to operate as a suspension or extinguishment of the rent." The rule contended for by the defendant is a very different one, suspending or extinguishing the rent whenever the enjoyment, in consequence of the tortious

act of the lessor, becomes less beneficial than it otherwise would have been. The true rule from all the authorities is, that while the tenant remains in possession of the entire premises demised, his obligation to pay rent continues.

The remaining question is, whether a counter-claim, arising from the facts contained in the answer, is available to the defendant in this action? By section 149 of the Code, the defendant is permitted to include in his answer now matter constituting a counter-claim. Section 150 defines the class of demands which are embraced in section 149. A counter-claim must be, 1st. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action; or, 2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action. The demand of the defendant, set out in the answer, does not arise out of the contract set forth in the complaint. That contract is for the payment of rent upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff, in permitting water to leak and run into the premises, and in causing or permitting it to be thrown upon the premises and property of the defendant. These acts are entirely independent of the contract of leasing, upon which the action is brought. The demands are not connected with the subject of the action. *That* is the rent agreed to be paid for the use of the premises. The defendant's demands are for a series of injuries to his property deposited upon the premises, and for impairing the value of the possession. It would be a very liberal construction to hold that, in an action for rent, injuries from trespasses committed by the lessor upon the demised premises, might be interposed as a counter-claim. The acts of the plaintiff in this case, are of a similar nature. They are either acts of trespass or negligence, from which the injuries to the defendant accrued. Such a construction could only be supported by the idea that the subject of the action was the value of the use of the premises. But when there is an agreement of the parties fixing the amount of rent, that

value is immaterial. Unless the acts of the defendant amount to a breach of the contract of letting, they are not connected with the subject of the action.

In the case of *The Mayor of New-York agt. Mabie* (3 Kern. 151), it was held by this court, that a covenant for quiet enjoyment by the lessee was implied in a lease under seal for a term not exceeding three years, *since*, as well as before, the Revised Statutes; that this covenant was broken by interference with possession by the lessor, under a claim of right. Consequently, that damages sustained from such acts might be recouped in an action for rent. It was remarked by DENIO, Judge, in giving the opinion in that case, "that it is not, however, every mere trespass by the lessor, upon the demised premises, which will amount to a breach of this covenant. Although the covenantor cannot avail himself of the subterfuge that his entry was unlawful, and he, therefore, a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under an assumption of title." For this the learned judge cites *Platt on Covenants*, 319, 320. There is nothing in this case tending to show that any of the acts of the plaintiff were done under any claim of right whatever. They did not, therefore, amount to a breach of the contract created by the lease; and the injuries sustained by the defendant do not, therefore, constitute a counter-claim connected with the subject of the action. The judgment should be affirmed.*

* NOTE.—When the landlord, by his wrongful acts, produces eviction as to *part* of the demised premises, it is such a *disturbance of possession* of the tenant, as to the *remainder*, that the rent of the whole is *suspended*, although the tenant remains in possession of the remainder. This is so well settled by numerous authorities, that there can be no doubt about it. Now, this suspension of rent, as to the *remainder of the premises*, constitutes what we call *constructive eviction*—nothing more, nothing less. Because eviction, whether by actual or constructive entry, is composed of two parts—first, *entry*; second, *expulsion or dispossession*. There may be a *constructive entry*, producing *actual* eviction or expulsion, as in the case of *Dyett agt. Pendleton*, and there may be *actual entry*, producing *constructive* eviction or expulsion, as in the case first above stated; or there may be, since the decision in *Dyett agt. Pendleton*, a *constructive entry*, producing *constructive* eviction or ex-

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pulsion, at least, as to a part of the premises; and our difficulty, briefly stated in a NOTE to this case in 14 How. 116, was, why the same *entry*, whether actual or constructive, which produced what we call constructive eviction as to *part* of the premises, should not, with equal if not greater justice, be applied to the whole premises? In other words, why the injurious acts of the landlord, whether actual or constructive, which produces the tenant's *right to abandon*, and *in law* an eviction as to a *part* of the premises, may not apply to the whole premises?

We believe that, except the present case, there is no reported decision which raises this precise question. The court of appeals in this case, however, as appears from their published decisions, have not only considered the question beyond doubt, but so entirely clear, that the rule which gives the appellant the benefit of a *dissenting opinion* of the court below, as equivalent to a certificate of probable cause to save his *mulct* in damages on bringing the appeal, has not been allowed to have any effect, and *ten per cent.* on the amount of the recovery in the court below has been awarded the respondent. Some of the profession may (though we do not think the court entertained any such view), consider the damages awarded in the nature of a *penalty*, for presuming to go up on appeal from the judgment of a divided court.—[REP.]

NEW-YORK COMMON PLEAS.

MORGAN agt. ANDRUT.

An action cannot be sustained against a *married woman* for damages for the breach of an agreement, in cutting off or disconnecting gas-pipes from apartments which she had rented to the plaintiff, and agreed that the plaintiff should have the use of, although it appeared that she was doing business in her own name as a *feme sole*, and that her husband had absconded.

If a contract be made with a married woman, the contracting party takes it subject to the legal disabilities, and must rely either upon her separate property, and the facts necessary to charge it, or the liability of the husband, founded upon his supposed assent.

New-York General Term, July, 1859.

APPEAL from a judgment rendered at special term.

By the court—BRADY, J. The defendant rented to the plaintiff the second floor of the premises 504 Broadway, and agreed that the plaintiff should have the use of the gas fixtures on that floor, for the purpose of burning gas to light the same. At the time the lease was made, and at the time the agreement

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was made, assuming them to be independent of each other, the defendant was a married woman, but doing business in her own name as a *feme sole*, at 504 Broadway, aforesaid. The renting seems to have been the renewal of a hiring, which had ended on the 1st of May, 1857, and there is no testimony tending to prove that the agreement for the gas was subsequent to the hiring. The plaintiff so alleges, and it may, for the purposes of this appeal, be assumed to be true. In October following (1857), the defendant caused the gas-pipes connecting with the fixtures in plaintiff's apartments to be cut off or disconnected, and, for the damages occasioned thereby, that act being in violation of the agreement thereto relating, the plaintiff brought her action in the court below. It also appeared that the husband of the defendant had, in 1856, absconded, or run away, and had not returned at the time of the trial. The first question presented on these facts is, whether an action could be maintained against the defendant for the cause alleged. I think not. A married woman, at law, has no power to contract so as to bind herself generally. (*Jackson agt. Vanderheyden*, 17 *Johns. Rep.* 167; *Birdseye agt. Flint*, 3 *Barb. S. C. R.* 500; *Vanderheyden agt. Mallory*, 1 *Com.* 462); and courts of equity, in conformity with this principle, hold that her general personal engagements will not affect her separate property. (*Per JEWETT, C. J., in Vanderheyden agt. Mallory, supra*, 501.) The acts of 1848 and 1849, relative to married women, have not changed their disability to make contracts, or changed the rules of law in regard to them in that respect. (*Cobine agt. St. John*, 12 *How. Pr. R.* 333; *Coon agt. Brook*, 21 *Barb.* 546; *Yale agt. Dederer*, 21 *Barb.* 236; *Rouillier agt. Wernicki*, 3 *E. D. Smith*, 310.)

The fact that a married woman is doing business on her own account, does not alter the rule, although courts of equity might enforce any debt contracted for the benefit of her estate, which was intended to be a charge upon it. The husband would be liable for any debt contracted, or obligation incurred with his consent, express or implied (*Gates agt. Brower*, 5 *Selden*, 205), and would be responsible for her business en-

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gements made under such circumstances. In England, by a particular custom of the city of London, a married woman is enabled to carry on trade as a *feme sole* merchant. The trade must, however, be carried on within the city, and for the wife's sole account. If the husband meddle with it, he will not be protected by the custom. (*Bright on Husband and Wife*, 2 vol., 76, 77.)

It seems also to be the rule in England, that when the husband is an alien enemy, the exception does not apply, nor where he is banished for life. The cases on this subject will be found in *Bright on Husband and Wife* (*supra*, 70, 72, 73). The case of *Begget agt. Fuer* (11 East. 301), is, however, in point. The action was trespass, and it appeared that the husband came to this country in 1805, leaving his wife destitute. That the plaintiff had lived separate from him since that time, and had made contracts, and for her support had carried on trade as a *feme sole*. The court held that she could not maintain the action. In this case the defendant is not charged with any debt contracted with reference to her business, or for the benefit of her estate. It is for damages occasioned by the violation of a contract granting the use of a thing attached to the freehold, and the claim does not present any of the elements necessary to obtain relief against the estate of the defendant, if the action had been brought for that purpose. I have not been able to find any case in this state where, under circumstances like those disclosed herein, a married woman has been held liable and sued alone, and I think the judgment of the justice cannot be sustained on precedent or authority. If a contract be made with a married woman, the contracting party takes it subject to her legal disabilities, and must rely either upon her separate estate and the facts necessary to charge it, or the liability of the husband, founded upon his supposed assent.

The judgment should be reversed.

Miller agt. New-York & Erie Railroad Company.

SUPREME COURT.

EDMUND S. MILLER agt. THE NEW-YORK & ERIE RAILROAD
COMPANY.

A corporation having the right to contract an obligation for a specific purpose, have also the right to issue *any instrument* which either party may consider convenient in acknowledgment of it.

The act of 1848 having conferred on the defendants the power to borrow money to be applied to the construction of their railroad and fixtures, they have also the power to give their *bonds* in payment thereof, independent of the act of 1850, which gives to the defendants a right to issue their bonds for money borrowed, and the power to confer on any holder of such bond the right to convert the principal due into *stock* of the company.

New-York Special Term, June, 1859.

DEMURRER to complaint.

D. B. EATON, *for defendants.*

IRA O. MILLER, *for plaintiff.*

CLERKE, Justice. The act of 1848, relative to railroad companies, enacts that all existing railroad companies in this state shall possess all the powers contained in this act (*Laws of 1848, § 46.*) That act (section 17, subdivision 10), allows them to borrow money to be applied to the construction of their railroad and fixtures.

The bond upon which this action is brought, was made on the 1st day of March, 1849, and the complaint alleges that it was issued by the defendants for the extension of their road west of Binghamton. This sufficiently shows that it was for the purpose stated in the act, nor are we to presume that it was for the purpose of extending it beyond its limits in this state. But it is maintained that no authority is expressly given, by any act previous to that of 1850, "to issue bonds." This was not necessary. If the company were allowed "to borrow money" it is of little consequence in what manner or by what

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description of instrument they acknowledged the indebtedness and promised payment. The counsel for the defendants, however, argues because the act of 1850 gives the power to issue bonds, the legislature must have understood that in 1849 no right to issue bonds existed. This would not, by any means, be a legitimate inference. The power to borrow, given by the act of 1848, was not accompanied, as we have seen, by any restriction as to the manner of evidencing the debt. On examining the act of 1850, where the powers of the act of 1848 are enumerated in an extended form (*Laws of 1850, p. 225, § 10*), it will be found that the right to issue bonds is indeed given, but it seems to be introduced rather for the purpose of an additional power, which it was deemed expressly to provide for, namely, giving the directors the power to confer on any holder of a bond, issued for money borrowed, the right to convert the principal due into stock of the company.

There is nothing in this act, or in any act, ignoring the idea that a corporation, having the right to contract an obligation for a specific purpose, has also the right to issue any instrument which either party may consider convenient in acknowledgment of it.

The complaint is in every respect sufficient; at least, it contains no defects which can be taken advantage of by demurrer. The plaintiff is not obliged to allege that it was *necessary* to issue the bond, or that the money was borrowed for "the completion, furnishing or operating of the road." If the money was borrowed after 1850, this language may be requisite; but the money in question was borrowed under the power given by the act of 1848.

The demurrer must be overruled with costs, with liberty to defendants to answer within twenty days.



SUPREME COURT

WILLIAM GRAHAM agt. WILLIAM WELLS, Sheriff of Rensselaer.

In an action for the recovery of *personal property*, during the three days allowed the defendant within which he may make his election to hold the property himself (§§ 210, 211), the sheriff or other officer is required to retain the property in his possession.

If the defendant elect to hold it, the officer is still to retain the property until the defendant's *sureties justify* (§ 211), unless he is willing himself to take the risk of such justification. The effect, therefore, of a demand of the property by the defendant, in the manner specified, is not to entitle the defendant to have the property delivered to him, but to prevent a delivery to the plaintiff.

The *time* within which the defendant is to proceed to have his sureties justify, is not limited. Nor need it be, as the plaintiff's security is the liability of the officer until sureties have completely justified.

The requirement of the statute on the *justification* of the sureties is, that where more than *two* bail are allowed to justify, the whole justification shall be equivalent to that of two sufficient bail; and where there are but two bail, *each* must justify in the amount required in the undertaking, which in the aggregate makes *double* that amount.

Therefore, where there were more than two sureties, who justified in the aggregate to a less amount than double that required, *held* irregular.

At Chambers, Albany, November 2d, 1857.

MOTION to stay proceedings, &c.

On the 13th of October, 1857, this action was commenced to recover the possession of a store of goods, which the defendant had taken by virtue of attachments against one Thomas Canavan. On the same day, the coroner, to whom process for that purpose had been delivered, took possession of the property, and still retains the same. The value of the property was \$22,100, according to the plaintiff's affidavit.

On the 16th of October, the defendant delivered to the coroner an undertaking executed by several sureties, and in all respects conformable to the requirements specified in the 211th section of the Code, and required a return of the property.

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On the 21st of October, the defendant's attorney served on the plaintiff's attorney a notice that the sureties would justify before one of the justices of the supreme court, at the City Hall, in the city of New-York, on the 23d of October.

At the time specified in the notice, the parties appeared before the justice, and three of the sureties in the undertaking justified to the amount, in the aggregate, of \$60,000.

Before the examination of the sureties commenced, the counsel for the plaintiff objected to the jurisdiction of the judge, on the ground that the justification could not take place in New-York, the place of trial being in Rensselaer; and, also, on the ground that the justification was too late in point of time. The judge directed the justification to proceed, subject to the objections.

After the justification was concluded, the counsel for the plaintiff insisted that the sureties were insufficient, for the reason that the aggregate amount in which they had justified, was not equal to twice the amount specified in the undertaking. The judge overruled the objection, and held that the sureties were sufficient. The justification was accordingly approved by the judge.

Upon affidavits, showing these facts, and a notice of motion to be made on the last Tuesday of November, to set aside the undertaking and justification, an order was made on the 29th of October, requiring the defendant to show cause before the judge making the order, on the 2d of November, why the proceedings in the action, so far as relates to the delivery of the property in question to the defendant, should not be stayed, until the motion could be made and decided, and in the meantime staying such proceedings.

Upon the day for showing cause, the parties appeared before the judge, and the questions involved in the motion were argued by counsel.

W. A. BEACH, *for plaintiff*.

M. I. TOWNSEND, *for defendant*.

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HARRIS, Justice. Upon the commencement of an action for the recovery of personal property, the defendant has the right to elect whether the plaintiff or himself shall hold the property, *pendente lite*. Three days are allowed him, within which he may make this election. If he do not elect to hold the property himself, he may take measures to see that the security given by the plaintiff for a return of the property, in case a return should be adjudged, is sufficient. For that purpose, he may, within the three days, except to the sufficiency of the sureties. Such exception is, of itself, evidence of his election not to hold the property himself.

If, on the other hand, he elects to hold the property himself, he must, within the time limited, signify such election by requiring the officer who served the process to return the property to him, and, at the same time, deliver to the officer an undertaking as provided in the 211th section of the Code.

During the three days thus allowed to the defendant, within which he may make his election, the officer is required to retain the property in his possession. If the defendant elect to hold it, the officer is still to retain the property until the sureties justify, unless, indeed, he is willing himself to take the risk of such justification. The effect of a demand of the property by the defendant, in the manner specified, is not to entitle the defendant to have the property delivered to him, but to prevent a delivery of the property to the plaintiff. If the defendant would have the property himself, he must proceed to have his sureties justify in the manner provided in the 212th section of the Code.

The time within which the defendant is to proceed to have his sureties justify, is not limited. Nor need it be. It is enough for the plaintiff, that the property is to be retained by the officer until such justification takes place, unless the officer chooses to make himself personally responsible that the sureties shall justify. The plaintiff cannot have the property, and whether it remains in the hands of the officer or the defendant, does not concern him further than to know that he has sufficient security for the delivery of the property to him, in case

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he obtains a judgment for such delivery. This security he has in the liability of the officer, until the sureties have completely justified.

In this case, the defendant elected to hold the property himself. For that purpose he required that it should be returned to him, and delivered to the officer who held the property, an undertaking, executed by a sufficient number of sureties, who thereby became bound to the plaintiff in the sum of \$45,000, for the delivery of the property to the plaintiff, in case a delivery should be adjudged, and for the payment to him of such sum of money as, for any cause, he might recover against the defendant. This was enough to prevent a delivery of the property to the plaintiff.

Five days afterwards, for the purpose of getting the property back into his own hands, the defendant gave notice of the justification of his sureties. The notice was regular. The justification was to take place before one of the justices of this court in New-York. The bail resided there, with the exception of one who resided in Brooklyn, and no objection was taken to the proceedings before the judge on this ground.

Although *five* sureties executed the undertaking, but three appeared to justify. These only justified, in the aggregate, to the amount of \$60,000. The requirement of the statute is, that where more than two bail are allowed to justify, the whole justification shall be equivalent to that of two sufficient bail. The amount specified in the undertaking was \$45,000. If there had been but two sureties, they would each have been required to justify in this amount. This would have amounted, in the aggregate, to \$90,000. A less amount than this was insufficient. And yet sureties have been pronounced sufficient who have only justified to the amount of \$60,000. I regard such a justification as irregular. The application for a stay of proceedings must, therefore, be granted.

UNITED STATES CIRCUIT COURT.

THE UNITED STATES agt. JOHN C. McAVOY.

An indictment, in other respects correct, is not invalid by reason of not containing the signature of the district-attorney—that office being vacant (by death) at the time the indictment was found.

New-York, January 28th, 1860.

THE prisoner in this case was indicted and convicted for setting fire to the ship Japan. There were, at the same time, five others indicted and convicted for various felonies. A motion in arrest of judgment was made, in the several cases, on the ground that the indictments were not valid, as they did not contain the signature of the district-attorney, the office being vacant at the time the indictments were found. The motion having been argued by counsel for the prisoners, and the district-attorney for the United States, Judge BETTS, assigned, orally, his reasons on deciding the motion, as follows:

The main objection taken by the prisoners' counsel to the indictment was, that the grand jury originated them of their own accord, and that they were brought into court, and the prisoners were put to trial under them, without the signature of a district-attorney being affixed to the indictments; and that, in fact, the office of district-attorney was vacant when the grand jury acted upon the cases, and found and brought the indictments into court. It was also objected that the indictments were void in not charging that the various offences, being felonies, were committed feloniously.

The judge observed, that the facts attending the course of the proceedings in the cases before the grand jury, had been more accurately ascertained since the trial than they were known to the court at the time the motions in arrest of judgment were first presented. The grand jury were empaneled and sworn during the lifetime of the late district-attorney; all

the prisoners but one had been arrested upon these charges, taken under the directions of an official assistant-attorney before proper magistrates, and examined and committed by such magistrates for trial upon these charges, before the grand jury were qualified and charged by the court. The court instructed the grand jury explicitly to take cognizance of these commitments. They entered upon their duties on the 7th of December last, having some of these papers laid before them by the district-attorney that day, and how far they proceeded in their action upon the cases on the 7th and 8th of December, is not made to appear by any record or papers in court. On the night of the 8th of December, Mr. Sedgwick, the district-attorney, died, and on the 4th of January instant, his successor assumed the duties of office. The grand jury returned the bills of indictment into court December 21st, and on the 10th of January, the official assistant of the present district-attorney called up the indictments, had the prisoners arraigned in court, who all pleaded not guilty to the indictments, and a day was designated by the court for their trials. No exception was then taken in their behalf to the indictments. The grand jury, having completed their business, were the same day discharged for the term by the court. The prisoners were put upon their trial at the time appointed, and no exception to the sufficiency of the indictments was taken until verdicts of guilty were rendered in all the cases. The court, upon these facts, ruled the following points:

1. The grand jury did not originate any of the indictments of their own motion and accord, but the cases were submitted to their attention and action by the express instructions of the court.

2. One case was actually laid before the jury on the 7th of December by the then district-attorney, and there is reasonable ground to presume that all the other cases but one, in the same condition at the time, were also brought before the jury on the commitments theretofore made by magistrates during the life of the then district-attorney.

3. McAvoy alone was examined and committed by a com-

missioner after the decease of Mr. Sedgwick, and the indictment against him was found and filed in court whilst the office of district-attorney was vacant, but the grand jury were charged by the court to inquire into all cases of parties imprisoned for criminal offences against the laws of the United States, and were thus empowered to take cognizance of his case.

4. The signature of a district-attorney constitutes no part of an indictment, and is only necessary as evidence to the court that he is officially prosecuting the delinquents conformably to the duty imposed upon him by statute.

5. The appearance in court of the district-attorney on the 10th of January, moving the arraignment of the prisoners and their trial under these indictments, is an adoption of the indictments by him, and full evidence to the court of his concurrence in the acts of the grand jury, and of his prosecuting the delinquents in the name of the United States, pursuant to the authority and directions of the act of congress.

6. There appears to be no power, by statute or usage, conferred on the courts of the United States to recognize a suit, civil or criminal, as legally before them in the name of the United States, except the same is instituted and prosecuted by a district-attorney legally appointed and commissioned conformably to the statute.

7. The offence of wilfully setting fire to a ship at sea, with intent to burn her, being charged in the indictment in the words of the statute creating the crime, the allegation is sufficient without adding the words "feloniously."

The motion in arrest of judgment in this case, and all the others in which the same questions are involved, is accordingly denied.

Kipp, Jr., agt. Munroe.

SUPREME COURT.

ISAAC KIPP, JR., agt. ERASTUS P. MUNROE and others.

Where the defendants were sued on an executory contract for the purchase of one hundred shares of the Nicaragua Transit Company, and upon the trial they offered to prove, by a certified copy of a decree of the Rivas government, that at the time of making the contract, the charter of the company and all its privileges had, without the knowledge of the defendants, been *revoked and annulled*, and the company been dissolved and abolished,

Held, that it was error to exclude this evidence. The stock certificates of a company, and the promissory notes of an individual, are equally choses in action, and, so far as *insolvency* is concerned, stand on the same footing; and, therefore, an executory contract for the purchase of such certificates, comes within the case of *Benedict* agt. *Field* (16 N. Y. R. 595).

New-York General Term, September, 1859.

Present, ROOSEVELT, INGRAHAM and PRATT, Justices.

MOTION for a new trial, on judgment on report of referee.

By the court—ROOSEVELT, Justice. The defendants, although partners, carried on their business in the sole name of Fleming, and the present action is brought on the following contract made by them in that manner:

"100 shares 23 B. 30. New-York, March 4th, 1856.

"I have purchased of Isaac Kipp, Jr., one hundred (100) shares of the stock of the Nicaragua Transit Company, at twenty-three (23) per cent. payable and deliverable, buyer's option, in thirty days, with interest at the rate of six per cent. per annum.

A. FLEMING."

On the trial before the referee, the defendants offered to prove that the Rivas government made a certain decree, a certified copy of which was produced duly authenticated, and that this decree was promulgated in the public square of Granada, the place where decrees are promulgated, the residence of the government, about the 18th of February, 1856. That the govern

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ment which made the decree was the government at the time, and had full power and right to make such decree, and that such decree had been carried into effect.

The referee, however, excluded the evidence, and, as we think, erroneously.

Had the decree been admitted, it would have shown, or at least would have tended to show, that, at the time of making the contract, the charter of the company and all its privileges had, without the knowledge of the defendants, been "revoked and annulled," and the company itself been "dissolved and abolished." It would, in other words, have shown that the thing contracted for had substantially no existence. What the defendants bought, or agreed to buy, was one hundred shares of stock in a living company, and not a proportionate undivided interest in the remaining assets of a dead company in the hands of a receiver.

In the case of *Benedict agt. Field* (16 *New-York Reports*, 595), the court of appeals held that, upon an executory contract for the delivery of goods, to be paid for, on arrival, in the notes of a third party, if that party becomes insolvent before delivery, the seller is not bound to deliver the goods and accept the notes, although the notes at the time may not be entirely worthless. So that stating the transaction in another form, as an executory purchase, of notes to be delivered, paid for in goods at a future time, the authority is precisely in point. The notes of an individual and the stock certificates of a company are equally choses in action; and, so far as insolvency is concerned, stand on the same footing. The fact that the insolvency in the present case occurred before, instead of after, the date of the contract, can make no difference, as the defendants had no knowledge of the revocation until a subsequent period.

The report of the referee, and the judgment entered thereon, should be set aside, and a new trial had, costs to abide the event.

SUPREME COURT.

HIRAM JACKETT agt. HARRISON JUDD.

It is well settled that the party entitled to costs, is to have them under and by virtue of the statute in force at the time the verdict is rendered; which means at the time the *final verdict* in the cause is rendered.

The item of \$10, "for all subsequent proceedings before trial," as appears by the weight of authority, can only be *once* allowed, when the issue has not been changed, although new trials may have been had.

No more than \$10 costs can be allowed upon a motion for a *new trial*, upon a case or exceptions at the *special term*. Such a proceeding is, in no sense a *trial*, as defined by the Code. (*All the reported cases entertaining different views on this question examined.*)

The prevailing party on *appeal* to the *general term*, from an order of the *special term*, granting or refusing a new trial, is entitled to \$15, before argument, and for argument \$30. (*In arriving at this conclusion, it seems that the clear, concise and comprehensive language which generally pervades and adorns the terse style of the Code, has been concentrated with such power and brilliancy into the 5th subdivision of § 307, that the judges have become bewildered in the construction of that sentence, and but for their oath of office, which requires them to decide upon questions judicially brought before them, would have been quite contented to say they were entirely unable to give to the latter part of that subdivision ANY construction whatever.*)

Cattaraugus Special Term, October, 1859.

MOTION that clerk re-adjust costs.

The action was tried at the August circuit, 1856; at the April circuit, 1857, and at the August circuit, 1857, when the plaintiff had a verdict. The defendant, upon exceptions, obtained at special term, an order granting a new trial, costs to abide event. Upon appeal to the general term, the order was affirmed with costs to abide the event. The action was again tried at the June circuit, 1859, and the defendant had a verdict. The items of costs, objected to by the plaintiff and allowed by the clerk, are specified in the opinion.

C. C. TORRANCE, *for plaintiff.*

A. G. RICE, *for defendant.*

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MARVIN, Justice. The bill contains for the August circuit, 1856, the items, before notice of trial \$10, for all subsequent proceedings before trial \$10, for trial of issue of fact \$20. The items are the same for all the subsequent circuits, except the item before notice of trial \$10. This is omitted. The plaintiff objected that the items of costs at the August circuit in 1856, could only be allowed at the rate then existing; also, that the item for all subsequent proceedings before trial, could only be once allowed. The clerk overruled these objections. These items are according to the law as it existed at the time the action was last tried and the defendant had a verdict. It is settled that the party entitled to costs, is to have them under and by virtue of the statute in force at the time the verdict is rendered. (3 *Den.* 173; 1 *W.* 210; 14 *How.* 357, 279; 15 *id.* 121, 156; 5 *Abb.* 219.)

In this case, as there was a verdict at the August circuit, 1856, it is argued that all costs previous to that time, should be according to the specifications of the statute then existing. That verdict was set aside. We must be governed by the law existing at the time the final verdict is rendered. (*See opinion of JEWETT, J., in 3 Denio, 174.*) In that case, the cause had been several times tried, and one judgment of the supreme court had been reversed by the court for the correction of errors.

The objection to the repetition of the item for all subsequent proceedings before trial, was well taken. The weight of authority is, that this item can be allowed but once, when the issue has not been changed. (*Perry agt. Livingston, 6 How. 404, also 403.*) The cases 5 *How.* 336; 6 *How.* 413; 8 *How.* 271; 15 *How.* 121; 2 *Abb.* 360, were upon the trial of issues of law, and when the defeated party was allowed to amend on the payment of costs.

The bill contains the items for the special term, before notice of argument \$15, on argument of exceptions \$30. For the general term, the items as corrected by the defendant's attorney, at the time of adjustment, are, before argument \$10, argument \$15, clerk's trial fee \$1.00, printing points \$2.50.

The plaintiff objected that none of these items could be

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allowed, or any costs, as the orders of the special and general terms, did not specify the amount to be paid. He also claimed that if any costs were allowable, they could not exceed \$10 at the special, and \$10 at the general term.

The questions thus raised have long been embarrassing, and still are, unless as to the costs upon appeal to the general term, the amendment of 1858, to subdivision 5 of section 307 of the Code, has removed the difficulty.

Let us first inquire to what costs the prevailing party is entitled for the proceedings in the special term. The Code, as revised in 1849, specified the costs to be allowed in an action, when the defendant failed to answer, and judgment was had, and then at once proceeded to specify the allowances to be made when issue had been joined and a trial had been had. The allowances on appeal, except to the court of appeals, are then specified, and the cases mentioned in section 349 are excluded or designed to be, as all agree. (*Code*, § 307.) A circuit or term fee of \$10 is given, and a like sum to the adverse party, on postponing a trial. By section 315, it was provided that costs may be allowed on a motion, in the discretion of the court, not exceeding ten dollars. It was declared that "an application for an order is a motion," and that "every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." (*Sections* 400, 401.)

Nothing was said in the Code, of costs upon a motion for a new trial upon a case, or upon exceptions. Issues were carefully defined. They "arise upon the pleadings," and are of law or of fact, the former raised by demurrer, and the latter by controverting the matter of fact previously alleged by the adverse party. It is declared that a *trial* is the judicial examination of the issues between the parties, whether they be issues of law or of fact. The reason why I am referring thus particularly to these provisions of the Code, will be presently seen.

There was no provision in section 349, permitting an appeal from an order "when it grants or refuses a new trial, or when it sustains or overrules a demurrer." Of course, in the latter

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case, the appeal was from the judgment, and the case was provided for in section 307, giving specific items of costs.

The provision above quoted was first inserted in section 349 by the amendments of 1851, and that part of section 307, relating to costs on appeal, was so amended as not to apply "to appeals from an order granting or denying a *non-enumerated* motion." I think this was the first appearance in the Code of the term *non-enumerated motion*. In this state of the law, *Ellsworth* agt. *Gooding* (8 How. 1) was decided by Justice HARRIS. He held that a motion for a new trial, on a case or bill of exceptions, was not a non-enumerated motion, and that section 315 had no application to such a case, and if no other provision could be found, which was applicable, no costs upon such a motion could be allowed. He then brought the case within the provisions allowing a specific fee for the trial of an issue, and he allowed the costs of a trial at the special term; and upon the appeal from the order of the special term to the general term, he allowed the costs given upon an appeal from a judgment \$15 and \$30, holding that the appeal was under section 349.

Van Schaick agt. *Winne* (8 How. 5) was decided a few months after, by the same learned judge. The legislature, at its session in 1852, had again amended that part of section 307, relating to costs on appeal, so as to exclude the cases mentioned in section 349, thus getting rid of the unfortunate term, *non-enumerated* motion. As the law then stood, Justice HARRIS very properly held that the costs as upon appeal (\$15 and \$30), could not be given upon an appeal from an order of the special term overruling a demurrer. He held, however, that the costs upon appeal were the costs of a trial of an issue of law, instead of mere motion costs. He also laid down the rule that as often as the cause was examined by the court, whether upon a motion for a new trial upon a case or exceptions, or upon appeal from the order of a special term, granting or denying a new trial, or sustaining or overruling a demurrer, the prevailing party was entitled to the costs given upon a trial. Justice CRIPPEN, in *Nellis* agt. *De Forrest* (6 How. 413), had decided

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that only ten dollars could be allowed upon appeal from an order overruling or sustaining a demurrer. Justice HARRIS noticed and overruled this decision. These decisions were made in 1852. In *Hagar and wife agt. Danforth* (8 How. 448), Justice PARKER held, that a trial fee was proper upon the motion at special term for a new trial upon a case, citing the cases *supra* (8 How. 1 and 5.)

In *Moore agt. Cockcroft* (9 How. 479), it was held at general term, in the second district, that the argument of a motion for a new trial on a case, at special term, was neither an issue of law or fact, and that the only costs that could be allowed were \$10, in the discretion of the court. No notice is taken in the opinion of the previous cases. In *Wilcox agt. Curtiss* (10 How. 91), it was held by Justice CRIPPEN, that the plaintiff succeeding, at general term, upon a verdict subject to the opinion of the court upon a case, was entitled to a trial fee \$15, of an issue of law. He cites no authorities, but refers to several sections of the Code and the rules. He held that it was an *enumerated motion* under the rules.

In *The Mechanics' Banking Association agt. Kiersted* (10 How. 400), it was held, by Justice BOSWORTH, of the superior court of the city of New-York, that the fee as for the trial of an issue of fact, was proper upon a motion at special term, for a new trial on a case. He held that the proceeding was substantially a trial, as defined by the Code. He cites *Ellsworth agt. Gooding*, and *Hagar agt. Danforth*, *supra*, but does not notice *Moore agt. Cockcroft*, *supra*. In *The Potsdam and Watertown Railroad Company agt. Jacobs* (10 How. 453), Justice HUBBARD held, that on a motion for a new trial upon exceptions ordered to be first heard at general term, the prevailing party could only have motion costs, in the discretion of the court. He cited and commented upon, and disapproved *Ellsworth agt. Gooding*. He does not refer to any of the other cases.

I think I have noticed all the cases in this court touching the question under consideration, viz., what costs a prevailing party is entitled to, upon a motion for a new trial upon a case

at special term, and I submit that it would be difficult to say where the mere weight of authority is.

The decisions were made by able judges. *Moore agt. Cockcroft*, was a general term decision, and precisely in point. One of the cases decided by Justice HARRIS, arose upon demurrer, and the issue upon the appeal was the same as at special term, and undoubtedly an issue of law, as defined by the Code. Without stopping to balance the weight of these authorities, I will say that in this district, we have constantly held that only motion costs could be allowed. After a careful examination of the question, I am confirmed in the opinion that only motion costs can be allowed; that a motion for a new trial upon a case can in no sense be regarded as a *trial*, certainly not, as a trial is defined by the Code.

The decision of *Ellsworth agt. Gooding* may have been right as to the costs upon appeal, as the Code then was, as costs were given in all appeals, except from orders granting or denying a "non-enumerated motion." The judge was called upon to decide whether a motion for a new trial upon a case, was a non-enumerated motion, and it was very properly held that it was not, but going back to the old practice (and the use of the term in the Code rendered it necessary to resort to the old distinctions), it was correctly held, that such motion was an enumerated motion.

But the learned justice, in my opinion, erred in holding that any other than motion costs could be allowed for the proceedings in the special term. The use of the term *non-enumerated* motion, in the Code of 1851, had no effect upon the question of costs of the special term; it only affected the question of costs upon appeal. At the next session of the legislature, the blunder in using the term "non-enumerated motion," was corrected, and all the cases mentioned in section 349, were excluded from the provision, in section 307, giving costs upon appeal. And after the amendment of 1852, it is agreed by all that no costs could be allowed on appeal or at the special term, other than motion costs, unless the proceeding could be regarded as a trial. I have examined the opinion of brother HARRIS, in *Van Schaick*

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agt. *Winna*, with care, and I do not find that his mind, at the time, was directed at all to the definitions given by the Code of *issues* and a *trial*. Had it been, I am quite confident he would have discovered what I regard as error in his opinion. He refers to sections 349 and 315, and he supposes that these sections related to *non-enumerated* motions only; that is, prior to the amendment of 1851, giving an appeal from an order "which grants or refuses a new trial," &c.; and when this amendment was made, inserting in section 349 a class of cases previously, or rather under the old practice, known as enumerated motions, the learned justice thought that they ought not to be subject to section 315, relating to motion costs, and unless they were, then no costs could be allowed, unless they were regarded as *trials*. The error consisted in keeping up a distinction in motions, and withdrawing one class of motions from the provisions of the Code, giving in the discretion of the court, costs upon motions.

The Code does not distinguish motions into enumerated and non-enumerated, but it gives a clear and comprehensive definition of an order and a motion, viz.: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." "An application for an order is a motion." (§§ 400, 401.) Can it be doubted that an application for a new trial, made upon a case or upon exceptions at a special term, is a motion? And can it be doubted, when the court directs a new trial or denies it, and the direction of the court is entered in writing, that it is an *order*? An application for a new trial upon a case or upon exceptions, has always been called and known as a motion, and the decision upon the motion has always been known as, and called an *order*. The Code gives us the definition of a judgment. It "is the final determination of the rights of the parties in the action." (§ 245.) The proceedings in, and the results of an application or motion for a new trial upon a case, come clearly within the definitions of a motion and an order. Again, is there not still greater difficulty in bringing such proceedings and results within the definition of a *trial*, as given in

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the Code? "A trial is the judicial examination of the issues of law or fact." (§ 252.) What are issues? The Code informs us, "*issues arise upon the pleadings*, when a fact or conclusion of law is maintained by one party, and controverted by the other."

They are of law or of fact. The Code informs us how these issues are to be tried. An issue of law must be tried by the court, unless it be referred. Certain issues of fact must be tried by a jury, unless a jury trial be waived; other issues of fact are triable by the court, which may, however, order them to be tried by a jury, or may under certain circumstances refer them to be tried by a referee. Again, all issues of fact triable by a jury or by the court, must be tried before a single judge, at a circuit court, if by jury, otherwise at a circuit or special term. Either party may give notice of trial. The Code proceeds to give directions relating to the trial by jury, by the court, and by referees. It has always seemed to me, on reading these provisions, that it is impossible to bring the proceedings always known as, and called, "an application, or motion for a new trial upon a case," within them. Such a proceeding was never designated, called or known in law as a *trial*, much less as a trial of an issue of fact, joined by the parties, through the instrumentality of *pleadings*; and I submit, with great deference, that to call such proceeding a trial of an issue of fact, is to confound language, and render our law definitions and terms useless, indeed worse than useless, instruments of confusion.

In my opinion, no more than \$10 costs can be allowed upon a motion for a new trial, upon a case or exceptions at the special term. Such a proceeding is, in no sense, a trial as defined by the Code.

To what costs is the prevailing party entitled upon the appeal to the general term from the order of the special term, granting or refusing a new trial? Prior to the amendments to the Code of 1858, I should have said, as was constantly held in this district, that motion costs only could be allowed in the general term. By the amendment, the 5th subdivision of section 307, after specifying the costs of appeal, before argument

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\$15, for argument \$30, reads thus: "and the same costs shall be allowed to either party before argument, and for argument on application for judgment upon special verdict, or upon verdict subject to the opinion of the court, as for a new trial on a case made, and in cases where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section 265." What is here meant? I may as well say frankly, I do not know; nevertheless, I am to say, and decide judicially, what the meaning is, unless I shall conclude that it is incapable of construction. I have been inclined to hold that the standard for the three cases specified, was the costs "for a new trial on a case made," and that the amendment had not, in the least, affected the question as to the amount of costs to be allowed upon an appeal from an order granting or denying a new trial upon a case. This construction would leave open the question, about which judges have so much differed, and of course leave the three cases mentioned in the amendment, in the same dilemma. I have learned from the secretary of state, that the statute is correctly printed. I have come to the conclusion that it was the intention of the legislature to take all the cases mentioned from the provisions relating to motion costs only. After much reflection and perplexity, and after consulting my brothers GREENE and DAVIS, and an able judge in another district, I have come to the conclusion that the legislature intended to provide the same costs as upon appeal from a judgment, before argument and for argument, in the four cases, viz.: upon an application for judgment upon a special verdict, upon a verdict subject to the opinion of the court, upon a motion for a new trial upon a case made, and in cases where exceptions are ordered to be heard in the first instance at a general term. I admit that this is taking more liberty with the language of the statute than I like to take, but I submit that if construed at all, this is the better construction. A reference to the amendment to this subdivision, made in 1857, may be of some service. That amendment consisted in adding the provision relating to costs in cases ordered to be heard in the first instance at a general

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term, and giving the same costs in that case, as upon appeals generally, viz., \$15 and \$30.

In making the amendment in 1858, the language, "an application for judgment upon special verdict, or upon verdict subject to the opinion of the court, as for a new trial on a case made," was inserted, leaving the provision of 1857, relating to costs in cases where exceptions were ordered, &c., slightly amended, to stand as the last clause of the sentence. I do not suppose that the legislature intended to reduce the costs in the case provided for by the amendment of 1857, but I suppose the intention was to put the three new cases specified in the amendment of 1858, upon the same footing. It is true that the language "except appeals in the cases mentioned in section 349," was left to stand, without noticing the incongruity. The word "*as*," before "for a new trial, &c.," creates the difficulty. If this word were "*and*" or "*or*," the difficulty would cease. The language would then be, as it now is, very elliptical. Several readings have been suggested. One of them omits the words "*as for a new trial*," thus improving the language and providing for three cases only.

The better reading probably is, the same costs shall be allowed to either party before argument, and for argument, on application for judgment upon special verdict, or on application for judgment upon a verdict subject to the opinion of the court (upon a case to be made), as also an application for a new trial on a case made, and in cases where exceptions, &c. I shall not argue the question. I confess I am not satisfied with any construction that has occurred to me, or that has been suggested; and if any construction shall hereafter be given to the language so unfortunately used, more satisfactory, I shall give to it my cheerful assent.

The result to which I have come gives to the defendant—the prevailing party—upon the appeal, in the general term, before argument \$15, for argument \$30. The clerk will readjust the costs, accordingly.

SUPERIOR COURT.

CHARLES MALLORY and others agt. THE COMMERCIAL INSURANCE COMPANY.

On an American vessel leaving the port of New-York for a trading voyage around the world, a time policy of insurance on her freight was taken out, containing the following restrictive clause :

"To be confined to the trade between Atlantic ports of the United States, or the ports of Liverpool, London and Havre, and the Pacific ocean, China seas, including Australia, Van Dieman's Land, and ports in the Indian ocean."

Held, on the trading voyage having been made to San Francisco, to Australia, to Hong Kong, to Bombay, to Liverpool, and from thence to New-York (having been lost in sight of the American shore), that she was as much within the restricted clause by coming home direct from Liverpool to New-York, as she would have been by sailing around Cape Horn to San Francisco or to the Indian ocean, and from thence to New-York. The company held liable.

New-York Special Term, January, 1860.

THIS was an action on a policy on freight on the ship Samuel Willetts, and was tried before Justice PIERREPONT, who rendered the following decision :

PIERREPONT, J. This American vessel left New-York on a trading voyage around the world, and the plaintiffs, through their agents, J. D. Fish & Co., took out a time policy on her freight, containing the following clause : "To be confined to the trade between Atlantic ports of the United States or the ports of Liverpool, London and Havre, and the Pacific ocean, China seas, including Australia, Van Dieman's Land, and ports in the Indian ocean," &c.

The ship proceeded to San Francisco, to Australia, to Hong Kong, to Bombay, and thence to Liverpool, trading meanwhile. From Liverpool she sailed for New-York, and was lost in sight of the American shore.

It is conceded that the defendants would have been liable in the absence of the restrictive clause which is written in the

Mallory agt. Commercial Insurance Company.

policy. It is also conceded that if the vessel had proceeded from Bombay to New-York, and the loss had happened at the identical point where it did in this case happen, that then the defendants would have been liable.

It is further conceded, that in all her wanderings, from the time she left New-York, to the hour she sailed from Liverpool on her return to New-York, she was covered by the policy. But it is claimed that when at Liverpool she had no way of returning home under the policy except to return to "the China seas," "Australia," "Van Dieman's Land," "the Indian ocean," or to some port on the Pacific ocean, and thence home to New-York.

Whether this view of the defendants is correct or not, depends upon the true construction of the written restrictions in the policy.

If the vessel, having gone to San Francisco, Australia, Hong Kong, Bombay, and from thence to Liverpool on her way home, was not confining herself "to the trade" meant in the restrictive clause of the policy, then the defendants are right, and the plaintiffs cannot recover.

It is very clear that she was in the restricted "trade" up to the moment that she left Liverpool for her home in New-York, and that if she had sailed from Liverpool around Cape Horn to San Francisco, and from thence to New-York, she would still have continued in the restricted "trade" indicated in the policy.

The sole question then is, whether, by coming home direct from Liverpool to New-York instead of round by China or San Francisco, she went out of the "trade" within which she was by the policy restricted.

No foreign words or technical terms are used in this written clause of the policy; the words are all English, of every day use, and of import well understood. What do they mean when used in this policy to restrict the trade of this vessel on her voyage around the world?

I am quite satisfied that no party to this policy supposed, when the policy was written, that the vessel could not stop at

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Liverpool on her return voyage from China, and sail from that port direct to New-York, without passing beyond the restricted limits of trade mentioned in the policy.

I am quite persuaded that no intelligent shipping merchant in the city of New-York, on receiving such a policy as this, would suspect that the restrictive clause would prevent the vessel on the return home from China on her "round voyage," from taking cargo at Liverpool direct for New-York.

I think that a vessel so trading is within "the trade" to which she is restricted by the policy.

If there were any custom or usage which could control this natural understanding derived from the plain import of the words employed, it would have been easy to have shown it by shipping merchants familiar with this trade. But no suggestion of such usage was made, and no evidence of such merchants was offered. To the question which was asked of the insurance officer about the course of trade, no basis was laid, and no evidence of his knowledge or capacity to speak on that subject was prepared, and the question was excluded.

I am of opinion that the plaintiffs are entitled to recover.

SUPREME COURT.

DAVID WILKLOW agt. JOHN J. BELL, DANIEL D. BELL and
MEEKER GORHAM.

Where in an action against the maker and indorsers of a promissory note, the defendants put in separate answers and defend separately, and the plaintiff recovers a verdict against the maker only, and the other defendants have a verdict in their favor, the latter cannot tax their costs against the plaintiff of course; but must, under section 306, make application to the court, for an award of costs. (*This agrees with Bank of Attica agt. Wolf, ante, p. 102; and Zink agt. Allenburg, ante, p. 108, all general term decisions decided in September, 1852.*)

Wilflow agt. Bell.

Albany General Term, September, 1859.

WRIGHT, GOULD and HOGEBROOM, *Justices.*

THE plaintiff sued John J. Bell as the maker, and Daniel D. Bell and Meeker Gorham as the indorsers of a promissory note, in this action. They all defended, having put in separate answers. The cause was tried at the Ulster circuit.

The jury rendered a verdict in favor of the plaintiff against John J. Bell, and against the plaintiff in favor of the defendants Daniel D. Bell and Meeker Gorham. The latter thereupon entered judgment for their costs, without application to the court, or an award of costs in their favor. The plaintiff objected unsuccessfully to the taxation, and the judgment being perfected, moved at the Poughkeepsie special term to set aside the judgment as irregular for that reason, which motion was denied, and the plaintiff thereupon appeals to this court.

E. COOKE, *for plaintiff.*

C. SWAN, *for defendants.*

By the court—HOGEBROOM, Justice. By the terms of section 304 of the Code, costs are allowed, of course, to the plaintiff upon a recovery in the actions therein mentioned—which are the ordinary common law actions—with certain exceptions not material to be noticed. And as no discrimination is expressly made between cases where the plaintiff recovers against all of the defendants, and where he recovers only against some of them, and as no other provision is made for his costs in the latter contingency against the unsuccessful defendants, it is perhaps fair to presume, and has been taken for granted if not expressly adjudicated in several cases, that in such contingency the plaintiff is entitled to costs against the party against whom he obtains a recovery of damages.

Section 305 allows costs of course, to the defendant in the same actions, unless the plaintiff is entitled to costs therein. This language has been construed to apply to the parties *distributively* as well as *collectively*—that is, to entitle the defending party to costs not only where there is a sole defendant, or where

there are several defendants, all succeeding against the plaintiff, but also where one or more of several defendants succeed against the plaintiff, the others being unsuccessful. (*Decker agt. Gardiner*, 4 *Seld.* 29; *Daniels agt. Lyon*, 5 *Seld.* 549; *Brown agt. Bowen*, 16 *How.* 544.)

Were there no other provision of the Code, these adjudications would be decisive of the present case, and would entitle the successful defendants to a judgment for costs as a matter of course. But there is another section, the effect of which is to be considered.

Section 306 provides that "in other actions costs may be allowed or not, in the discretion of the court." So far there is no ambiguity, and the language is expressly limited to *other* actions. Following this clause in the section in question, as it stood before the amendment of 1851, the section proceeded as follows: "*when* there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the *court may award* costs to such of the defendants as have judgment in their favor, or any of them." This phraseology considered in connection with the previous clause already quoted, and with sections 304 and 305, was considered only applicable to the classes of actions mentioned in section 306, and not to actions generally, or to those mentioned in sections 304 and 305. (*See cases before cited, and also Comstock agt. Bayard*, 2 *S. S. C. R.* 705; *Stone agt. Duffy*, 3 *id.* 761.)

But in 1851, the legislature slightly altered the sentence last quoted, by striking out the word "*when*," and inserting the words "*in all actions where*." In so doing, I am of opinion they must have intended something more than a mere verbal or senseless alteration. I think, therefore, that clause should now be construed as embracing *all actions whatsoever* in which the plaintiff fails to recover against *all* the defendants, and hence that it becomes necessary for the *court* to determine whether the successful defendants shall or shall not have costs against the plaintiff. I infer this, 1, from the comprehensive terms employed; 2, from the very fact that the phraseology is

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altered ; 3, from the fact that the subsequent part of the section making costs discretionary in cases when a new trial is ordered, and when a judgment is affirmed in part, and reversed in part, has never been, so far as I know, supposed to be limited to the actions mentioned in the introductory clause of section 306, and, therefore, the provisions of the entire section are not, as has been argued, applicable only to other than common law actions. The whole section seems intended to provide for *all* cases (of actions), where costs are in the *discretion* of the court, and to group them together in a convenient form for perusal or examination. The view of this section which I have just expressed, is also taken by the superior court of New-York, in the cases of *Bulkeley agt. Smith* (1 *Duer*, 704), and *Williams agt. Horgan* (13 *How.* 138), and is only opposed, so far as I know, by the case of *Brown agt. Bowen* (16 *How.* 544.) In the last case, the change of phraseology above referred to, does not seem to have attracted the attention of the court. And another ground for the last named decision is also noted in the following language, "and besides, the judge at the circuit gave him (defendant) judgment for costs."

I am of opinion, therefore, that the motion to set aside the judgment should have been granted. The order at the special term should be *reversed*, but without costs and without prejudice to an application by the defendants for costs, if they shall be so advised.

NEW-YORK SUPERIOR COURT.

JAMES S. CARPENTIER agt. JAMES C. WILLETT, sheriff of the city and county of New-York.

In order to justify the *arrest* of a defendant on execution issued upon a judgment obtained against him in a district (justice's) court, in the city of New-York, the justice must state in *the judgment*, and enter it in his docket, that the defendant is subject to arrest and imprisonment.

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It is the judicial duty and office of a justice of the peace in trying a cause, to pass upon the question of the defendant's liability to arrest, as definitely as upon that of his liability in the action, and to embody his judicial conclusion in his judgment.

There is no provision in the statute (*district court act of April 1857, see 'Howard's Code, 79*), for an inquiry into facts *subsequently* to a judgment, to justify an arrest.

Therefore, where subsequent to the judgment rendered against the defendant, which did not show any right to his arrest, the plaintiff made an affidavit before the justice that the demand upon which the judgment was rendered was for money received by the defendant in a *fiduciary capacity*,

Held, that the order of the justice made upon this affidavit, that execution issue against the person of the defendant, was null and void. His judicial power as to the cause, was then *functus officio*.

Held, also, that the *sheriff* in an action for escape of the defendant, imprisoned by virtue of such execution, could avail himself of the defendant's illegal arrest and imprisonment.

New-York General Term, February, 1860.

Present, BOSWORTH, HOFFMAN and MONCRIEF, Justices.

MOTION for judgment upon a verdict taken subject to the opinion of the court at general term.

The cause was tried before Chief Justice BOSWORTH, and a jury. The jury found a verdict for the plaintiff, and assessed his damage at \$275.33, subject to the opinion of the court at general term, and to be heard there in the first instance on the questions at law arising in the case, with liberty to the court at general term, to dismiss the complaint, if so advised, with the same effect as if dismissed at trial term, and exceptions taken by the plaintiff; judgment, in the meantime, to be suspended; the counsel of both parties consenting at the trial to the verdict being so taken.

The action was against the sheriff of the city and county of New-York, for the escape of Samuel H. Doughty.

On the 12th day of November, 1857, the present plaintiff recovered a judgment against the said Doughty in the third district of the city of New-York, before William B. Meech, Esq., justice of said court, for the sum of \$250 damages, and \$17.50 costs. On the 15th day of November, 1857, an execution was issued, purporting to be on such judgment, command-

ing any constable, in the usual form, to levy the amount of the goods and chattels of the defendant; and if sufficient goods and chattels could not be found, then commanding said constable to arrest the defendant, and commit him to the jail of the city and county of New-York, the keeper whereof was directed him safely to keep, until he should pay such judgment or be discharged according to law.

On the 18th day of November, 1857, one of the constables of the city arrested the said Doughty, by virtue of the execution, and committed him to the jail of the county, and to the custody of the present defendant, as sheriff of the city and county, and keeper of the jail thereof.

On the same 18th day of November, 1857, Doughty, with two persons as his sureties, gave what is termed a bond for the limits. It was executed to the sheriff, the present defendant, and recited that the said Doughty was a prisoner in his custody as sheriff of the county of New-York by virtue of a *capias ad satisfaciendum*. The following indorsement was on the execution: "Sheriff's return—defendant in custody—J. C. Willett, sheriff."

On the 21st day of November, 1857, Doughty was found off the limits, about seven o'clock in the evening, and the summons in the present action was duly served upon the defendant between eleven and twelve o'clock of the same night.

The record of the proceedings in the case in the third district court was given in evidence, and from this it appears that the present plaintiff sued as assignee of one France for the avails of certain notes belonging to France, deposited with Doughty, after satisfying a demand of Doughty, for securing which the notes had been delivered to him.

It was alleged that Doughty had received the sum of \$574.19, exceeding the balance due him by about \$300. The complaint demanded judgment for \$250. It is needless to state the defence.

The cause was tried on the 12th day of November, 1857. The closing entry of the record for the trial as returned to the court of common pleas upon an appeal, was as follows:

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"The parties here rested, and on the same day I rendered judgment for the plaintiff for \$250 damages besides costs. Dated, New-York, December, 16, 1857. Subject to amendments. William B. Meech, Justice."

The plaintiff produced in evidence a certified copy of the docket of the judgment in the district court, which so far as it is necessary to transcribe it, is as follows: "J. S. Carpentier, assignee of Thomas France against Samuel H. Doughty. Summons issued 15th September, 1857. Returnable 28th September; summons returned served in person, 15th September, 1857. Plaintiff appeared in person. Complaint on file. Defendant appears by Mr. Harrington. Answer on file."

Then follows a minute of various adjournments until November 12th. "November 12th, cause tried, and the court thereupon renders a judgment for the plaintiff for damages, \$250.00, costs \$5.50. Extra costs \$12—\$17.50—\$267.50."

"*Si nul*, ordered to issue by justice, November 13, 1857. *Si nul*, issued November 13, 1857."

There was also produced in evidence, under objection and exception by the plaintiff, the original entry of judgment by the justice of the third district court, in the suit by the plaintiff against Doughty, indorsed on the summons in that action. It is as follows: "Judgment for plaintiff, \$250; \$12 allowance and costs. November 12, 1857, Meech, justice."

The plaintiff's counsel then produced in evidence the following affidavit and indorsement:

"Third district court, James S. Carpentier against Samuel H. Doughty, city and county of New-York, ss. James S. Carpentier, the plaintiff in this action, being duly sworn, deposes and says, that this action was brought to recover money collected and received by the defendant to the use of the plaintiff and belonging to him; that judgment therein has been rendered for the plaintiff, and that, as appears by the pleadings and proofs in this cause, the said defendant received said moneys in a fiduciary capacity; to wit.: as a trustee, and refused to pay over the same on demand thereof by the plaintiff; and

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deponent further saith, that the said defendant is a non-resident of this state, and that since the commencement of this suit, he has made an assignment, as this deponent is informed and believes, of all his property and assets.

"Sworn this 13th of November, 1857, J. S. Carpentier. Before Wm. E. Smith, clerk in court." Indorsed:

"Execution against the body to issue. Wm. B. Meech, justice. November 13th, 1857."

An appeal was taken from the judgment of the district court to the court of common pleas. An undertaking executed upon such appeal was read in evidence by the defendant, under an exception by the plaintiff.

It is not deemed necessary to state the proceedings on that appeal, except that the judgment was affirmed, and that neither the affidavit of Carpentier last mentioned, nor the indorsement upon it, nor the entry "*Si nul*," ordered to issue of November 18th, 1857," nor the entry "*Si nul*," issued November 13th 1857," on the docket, were before the common pleas on such appeal.

JOHN GRAHAM, *for plaintiff.*

A. J. VANDERPOEL, *for defendant.*

By the court—HOFFMAN, Justice. The main question is, what is the effect of the omission of the justice to declare in his judgment that the defendant was subject to arrest and imprisonment? The 50th section of the act of April, 1857 (*vol. 1, p. 720; Howrd's Code, 98*), entitled, "an act to reduce the several acts relating to the district courts in the city of New-York into one act," applies to the case. It directs that "when a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered in the docket."

It deserves notice in explaining the intent and force of this enactment, that in the old act of 1813 (2 *R. S.* 376, § 98), a provision was made by which, in certain cases, an execution could go against the person, after an inquiry into certain facts

had subsequent to the judgment. But yet the *proviso* appears to enable the defendant to guard against this being done *ex parte*, by claiming an exemption.

Without however determining this point, or more fully entering upon the meaning of that provision, it is important to observe, that by the 30th section of the act to abolish imprisonment for debt, &c., of April the 26th, 1831, it was provided, "that no execution issued upon any judgment rendered by any justice of the peace, upon any demand arising upon contract, express or implied, or upon any other judgment founded upon contract, whether issued by such justice, or by the clerk of the county, shall contain a clause authorizing an arrest or imprisonment of the person against whom the same shall issue, unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of such clerk or justice, either—

1st. "That the person against whom the same shall issue, has not resided in this state for the space of thirty days preceding," &c.

The other cases are then enumerated in which the execution against the body may be allowed.

These provisions appear to allow of evidence being given to satisfy the justice after judgment, and *ex parte*.

The 16th section of the act of April, 1857, first referred to, specifies the cases in which a warrant of attachment may issue to arrest the defendant in commencing the action. They include the case of an agent receiving money in a fiduciary capacity and converting it, and the case of a disposition of property with an intent to defraud his creditors, and also, when the action is for the recovery of damages (in a cause of action not arising on contract), and the defendant is not a resident of the county. The language is similar to some of the provisions of the Code.

Unless the defendant Doughty received the money for which judgment was obtained, in a fiduciary capacity, he was not liable originally to an arrest on anything appearing in the case. And I apprehend that an execution could only be allowed

against the person, where the defendant could originally have been arrested.

The 25th section of the act provides, that when the defendant has been arrested, an adjournment cannot be had for more than forty-eight hours without his consent, and an adjournment for a longer time discharges him from such arrest; but the action may proceed, notwithstanding, and the defendant shall be subject to arrest on the execution in the same manner as if he had not been discharged. And by the second subdivision of section 52, as to the form of execution, "if it be a case where the defendant may be arrested, it may direct the officer, if sufficient property cannot be found to satisfy the judgment, that he arrest the defendant, and commit him to jail, until he pay the judgment, or be discharged according to law."

There is not in the statute any provision similar to such as I have referred to in previous acts, for an inquiry into facts subsequently to a judgment, to justify an arrest. There is in the eighty-first section a positive repeal of every law or rule in any case provided for by the act, or inconsistent with its provisions; and no law or rule is to be deemed retained because it may be consistent with the provisions upon the same subject in the act, saving rights existing or accrued, or proceedings already taken.

It appears to me that the enactment in question has assigned to the justice trying a cause under it, as part of his judicial duty and office, the obligation and necessity of passing upon the question of the defendant's liability to an arrest, as definitely as upon that of his liability in the action, and to embody his judicial conclusion in his judgment. If the defendant has been originally arrested, upon grounds apparently sufficient, he may have upon the trial the opportunity of disproving them, and showing their insufficiency. If he has not been arrested, still more important and more reasonable is it, that he should have the opportunity of shaping his defence to this point also upon the trial; of having it determined upon the evidence there given, and the case there made, and of having the right

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to review a judgment against him on this point, as well as on any other, by his appeal.

We are bound to assume that the justice ordered the execution against the person on the ground of the money being received in a fiduciary capacity. There was nothing else in the facts stated in the affidavit, which could have warranted it, and yet that question would be open to serious doubts, and might have been decided differently on the appeal had it been brought up.

The decision of the point of the subjection to arrest was part of the justice's judicial labor and duty. When he gave judgment on the 12th day of November, he had not made up his mind (as we are justified in assuming) upon this point, and perhaps it had not been suggested that the defendant was liable to arrest. "There can be no judgment even by legal implication, either in substance or in form, till a judicial conclusion is made by the justice." (6 *Hill Rep.* 41.) Equally clear is it, that there was no judgment stating that the defendant was subject to arrest made on the 12th of November, and that the order made the next day on an affidavit, was not a judicial conclusion on the case tried before the justice. He had tried the case on the 12th day of November. His judicial action on what he had tried was complete. On this particular subject he had reached no result judicially when he gave judgment.

It seems to me that the letter, the spirit, and the apparent object of the enactment referred to, all declare the statement in the judgment to be a judicial act, essential to the right to arrest, and not merely ministerial and attendant upon a judgment. The cases of *Watson agt. Davis*, 19 *Wend. R.* 371; *Young agt. Runnel*, 5 *Hill Rep.* 60; *Hull agt. Tuttle*, 6 *Hill Rep.* 38; and *Sibley agt. Howard*, 3 *Denio Rep.* 72, appear to me to warrant this conclusion. What was done on the 13th day of November was done when the justice, as to that cause, was, for all judicial power, *functus officio*, and his act was void, not merely irregular. The question as to a statute being directory or mandatory does not arise.

2d. The next question is, has the sheriff a right to avail himself of this matter as a defence to the present action?

It seems to me, that the cases cited by the defendant's counsel, and particularly that of *Phelps agt. Barton* (13 *Wend. Rep.* 68), settle this question fully in his favor.

So in *Constant agt. Chapman* (2 *Queen's Bench Rep.* 771), it was expressly decided, that when the marshal of the prison was sued for an escape, the defence was open to him that the party was not legally in custody at the time of the escape, and the case goes far to determine that receiving a prisoner with knowledge of the facts showing the illegality, is not enough to charge the marshal, though he detains the prisoner against his will, which would have been unlawful.

The view thus taken, disposes of the necessity of examining any of the defendant's exceptions to the rulings of the judge.

There are three exceptions of the plaintiff to be noticed.

The admission of the original entry of the judgment indorsed on the summons, was in our opinion proper. The entry is the judgment, and from that the clerk makes in his docket the entry required by section 59, subdivision 8, page 723.

The court admitted in evidence the undertaking given on the appeal to the court of common pleas, and also proof of the service of such undertaking on the defendant, to which exceptions were taken.

The sufficient reply to this is, that the court orders the complaint to be dismissed, because the judge should have done so on the trial, and orders it on the sole ground that the judgment of the justice does not state that the defendant was liable to arrest and imprisonment, and the case (under the stipulation) is to be altered so as to show that a dismissal was ordered at the trial, and that the plaintiff then excepted.

The complaint must be dismissed with costs.

People *ex rel.* Tobano agt. Governors, &c., of the House of Refuge.

SUPREME COURT.

THE PEOPLE *ex rel.* THOMAS TOBANO agt. THE GOVERNORS,
&c., OF THE HOUSE OF REFUGE.

The managers of the House of Refuge, in the city of New-York, have the power in their discretion, to put to service, and to bind out children convicted of vagrancy, &c., received by them, during their minority, to persons *residing out of this state*. There is nothing in the charter limiting the employment of such children to the premises of the institution, or their binding out to persons residing within the state.

And where on *habeas corpus*, the managers return that the child has been placed by them at employment with a person residing out of this state, where he still remains, it is a sufficient excuse for the non-production of such child.

New-York Special Term, December, 1859.

A WRIT of *habeas corpus*, issued on the petition of the father of Thomas Tobano, directed to the Governors, &c., of the House of Refuge, commanding them to produce the body of said Thomas, &c., was served upon the officers of that institution, to which they returned, that at the time of the allowance of said writ, the said Thomas was not nor had been at any time since, nor was he now, in their possession or custody, or under their control, power or restraint, or by them restrained of his liberty; that the said Thomas, in August, 1857, was convicted as a vagrant, and committed to the House of Refuge; that he was received under such commitment, being a prisoner, and remained until April, 1858, when he was placed by the managers of said institution at employment with Wesley McDowell, of Lexington, Illinois; but that no indentures of apprenticeship had been executed; and hence the respondents were unable to produce the body of said Thomas as commanded by said writ.

S. H. STEWART, *for petitioner.*

H. A. CRAM, *for respondents.*

People ex rel. Tobano agt. Governors, &c., of the House of Refuge.

JAMES, Justice. The only question presented for consideration, is the sufficiency of the excuse offered by the return for the non-production of the body of Thomas Tobano. The truth of the return not being controverted, it appears that the respondents have not at the time of granting the writ, nor at any time since, the custody or possession of the person named; and although they had such custody at a time long prior to the granting of such writ, it does not appear that such custody was parted with in bad faith, or for the purpose of unlawfully restraining the said Thomas of his liberty, or of evading the command of said writ.

It is, however, insisted by counsel that the excuse is wholly insufficient; that the transfer of said Thomas to McDowell, was wholly without authority, illegal and void; that the managers of the House of Refuge, by the terms of their charter, could only put the said Thomas to employment within the premises of that institution, or bind him out to some person residing within the state; and that having sent him beyond the state, they should be compelled to produce him in answer to the command of the writ.

The statute of 1824, authorizes the managers of the House of Refuge to receive children convicted of vagrancy, and gives power to place them during their minority, at employment suitable to their years and capacities, and in the discretion of said managers, with the consent of said children, to bind them out as apprentices, servants, &c. The legal rights of the respondents, therefore, to place the said Thomas at employment is clear; and the question of binding him was a matter wholly in their discretion. There is nothing in the act limiting the employment of such children to the premises of said institution, or their binding out to persons residing within the state. Such a construction would greatly circumscribe the institution in its efforts to care for the well being of those committed to its charge, without benefiting any one. The statute wisely gives to the board of managers a broad discretion in the matter, leaving to their determination the kind of employment and instruction, the persons with whom, and the place where

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it shall be given ; and I can see no necessity of its being limited to this city or this state. So long as the future well being of the child is considered, if suitable persons can be found out of the state, who will take charge of them, I see no legal objection to this selection.

In this case, the respondents made a lawful disposition of Thomas. For aught that appears or is produced, he is in the care and custody of a proper and suitable person. He is not now, nor was not at the time of granting the said writ, in the possession of the respondents ; and this being so, the excuse for the non-production of the body is sufficient, and the writ should be discharged.

NEW-YORK SUPERIOR COURT.

MICHAEL GUIST and others agt. JOHN MURPHY.

A part of an entire demand arising upon a promissory note, may now be admitted by the answer, under the last paragraph of section 244 of the Code, and the order made to satisfy the same may be enforced as a judgment. But it seems, not as a provisional remedy. (This is adverse to the views expressed in the case of Russell agt. Meacham, 16 How. 193, so far as allowing the splitting up of an entire demand is concerned.)

New - York Special Term, January, 1860.

THIS is an application for an order under section 244 of the Code, that the defendant satisfy part of the plaintiff's claim.

M. PORTER, *for plaintiffs.*

BERNARD HUGHES, *for defendant.*

MONCRIEF, Justice. The complaint is upon a promissory note made by the defendant, for the sum of \$351, and demands judgment for that sum, and interest from November 8th, 1859.

Campbell agt. Proprietors of the Champlain & St. Lawrence Railroad.

The answer "admits that the defendant is indebted to said plaintiffs in the sum of \$276," and also alleges matter upon which he claims to recoup the sum of \$75.

I entirely concur in the views expressed by Judge WOODRUFF, in 3 *E. D. Smith*, 614 (*and see also* 599 and 607), and can perceive no reason why the present is not just such a case as was intended to be embraced by the provision of the Code (*see also* 26 *Barb.* 200; 16 *How.* 193.)

The cases in this court are not, I think, in conflict with the opinion referred to. In 4 *Sand.* 673, the answer did not admit a specific sum due. In 2 *Duer*, 513, the answer did not admit a definite sum due to the plaintiff, and it required a critical examination of the pleadings to ascertain a specific sum to be due.

Some doubts being expressed (11 *How.* 360; 4 *Sand.* 711), as to the mode of enforcing such an order, the Code was amended in 1857, and the question is now relieved of any such embarrassment as then did, or was supposed to exist.

An order should be entered, directing the defendant to satisfy the part of the plaintiff's claim, viz., \$276, admitted to be just, and that such order be enforced by judgment and execution against the property of the defendant, without prejudice to the right of the plaintiffs to continue the action, and the trial of the issues between the parties, as to the residue of the claim made by the plaintiffs.

SUPREME COURT.

HENRY A. CAMPBELL agt. THE COMPANY OF PROPRIETORS
OF THE CHAMPLAIN AND ST. LAWRENCE RAILROAD.

Where the demand for which the action was brought, arose upon written contracts for the payment of money, made, executed, delivered and made payable in Canada; and all the labor done and materials furnished, were under those contracts, and upon work located in Canada, for a corporation created by the

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laws of Canada and existing there, except a small part, which was performed in this state, by virtue of said contracts,

Held, not a case where the *subject of the action* was situated in this state; and although the defendant (the foreign corporation) had *property in this state* liable to attachment, the attachment could not be sustained by a *non-resident plaintiff*. (*This agrees with Whitehead agt. The Buffalo and Lake Huron Railway Company, ante, page 218, but the decision was made prior to that.*)

Where it appeared that the parties had, previous to the commencement of this action, entered into a bond of submission to arbitrators in Canada, of all their differences and matters arising out of and under said contracts, whose award and determination should be final and conclusive upon them, and such submission was had, and an award made,

Held, that the *award* was the only *cause of action* arising out of said contracts, and unless the award was set aside, and the bond of submission revoked, the several matters which composed the plaintiff's claim, were merged in the award and could not be separated into their original elements.

And where the plaintiff's complaint counted upon the same claims submitted to the arbitrators and included in the award, and judgment demanded for precisely its amount, with interest from its date, at the rate allowed by the laws of Canada,

Held, that the action was upon the *award*, as none other could be maintained.

The action being upon the award, the award must be regarded as a *foreign debt*, not a cause of action arising within this state.

Therefore, neither the plaintiff (he being a non-resident) nor his cause of action, were within the provisions of the statute, which allows an action to be brought against a *foreign corporation*, and the court had no jurisdiction. Attachment, &c., set aside.

Clinton Special Term, February, 1858.

THIS is a motion to dismiss the summons and complaint issued in this action, to vacate the order of attachment, and to set aside the order authorizing service on the defendant by publication.

The facts of the case are these: The defendant is a foreign corporation, created under and by virtue of the laws of Canada; the plaintiff is not a resident of this state, but a citizen of the United States, and of the state of New-Hampshire; the action was commenced by summons and complaint, and upon an affidavit of indebtedness, that defendant was a foreign corporation and had property within the state; an attachment was issued, and property to the amount of about \$60,000 seized and detained under it; on the same affidavit, with an affidavit

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of the sheriff, that neither the defendant nor any of its officers could be found within the state, an order was granted, directing that service of the summons be made by publication, &c.

The complaint filed with the summons in the county clerk's office, sets forth that the defendant is a foreign corporation, with power to build a branch line of railroad from St. Johns in Canada, to some point on the St. Lawrence river, opposite Montreal, and from St. Johns to the Province line, at or near Rouse's Point, and to erect wharves, &c., at either termini; it states two causes of action, one for the labor and services of plaintiff and his servants, and material found in building a branch railroad from St. Johns to Rouse's Point, in the state of New-York, at the request of the defendant, in pursuance of an agreement made between them; the other for the use of, and injury to a locomotive, used and employed on said railroad in Canada. The complaint further averred, that the work and labor done, materials furnished, and money advanced by plaintiff, had been settled and agreed upon by and between the plaintiff and the authorized agent of the defendant.

The plaintiff in his affidavit, on which the attachment was issued, says that the indebtedness of the defendant to him, "arose for work, labor and services done and performed by him for the defendant, at its request and its agreement to pay him therefor, and for money paid, laid out and expended by plaintiff, at the request and for the benefit of the said defendant, and for materials furnished to the defendant by the plaintiff, at the request and for the use of the defendant, in and about the building of the defendant's railroad and its wharves at St. Lambert, in Canada East, and the appurtenances thereto appertaining and belonging;" that the whole amount of labor was \$568,785.59, and that he received \$491,637.01, leaving due on the 12th day of July, 1854, \$77,148.58.

The moving affidavits show, that the contracts for all the work, labor, materials and money, from which the plaintiff's demand arose, were made and executed in Canada, and payable there. Work was done under such contract in the state of New-York, to the amount of about \$15,699. On the 19th

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of October, 1852, the parties entered into an agreement to submit all their differences for work, labor, money, &c., arising under said contract to arbitrators therein named, whose award and determination should be final and conclusive upon them; said arbitrators afterwards met, and the parties submitted their claims and demands to them, and after having duly considered the same, they did on the 12th day of July, 1854, make their award, whereby they found due from the defendant to the plaintiff, the sum of \$77,148.58. This included the use of and injury to the engine, for which claim is made in the second count of plaintiff's complaint.

The defendant's affidavit shows that the locomotive for which claim was made in the second count of the plaintiff's complaint was used in Canada, injured in Canada, and that the contract of hiring and place of payment was in Canada. The whole sum claimed in the complaint is the same as the award, with interest from that date, at 6 per cent, the rate of interest in Canada.

JAMES AVERELL, *for plaintiff.*

T. ARMSTRONG and L. STETSON, *for defendant.*

JAMES, Justice. At common law, foreign corporations could not be reached by process of law from our courts, nor could their property within the state be made to satisfy demands or claims against them. Our statutes early gave a proceeding by attachment against property within the state, of non-resident debtors, including corporations—a proceeding which was the commencement of an action. That remedy still exists, notwithstanding the provisions of the Code of Procedure.

By the latter statute, actions must be commenced by a summons followed by a complaint. In the case of a foreign corporation, service of the summons may be by publication, when it shall appear that such corporation has property within the state, or the cause of action arose therein. (*Code*, § 135.) In such actions, as a provisional remedy, an attachment may also issue at the same time with the summons or at any time after-

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wards, and the property of the defendant be arrested and held to answer any judgment which the plaintiff may obtain in the action. (*Code*, § 297.)

The present action was commenced under the Code. By the Code, actions are only authorized to be brought against foreign corporations, by a plaintiff who is a resident of this state, by a non-resident plaintiff when the cause of action arose in the state, or the subject of the action shall be situated within the state. (*Code*, § 427.) The statute of 1849 also provides that suits may be brought against a foreign corporation, upon any contract made, executed or delivered within this state, or upon any cause of action arising therein. Unless this cause of action or its subject matter be within one or the other of these requirements, the court is without jurisdiction, and all further proceeding must cease and the action be dismissed.

There is nothing on the face of the original papers, showing that the case is within either of the provisions of section 427. Were not this a court of general jurisdiction, I should hold that the proceeding ought to be dismissed, for the reason that authority to entertain the action does not affirmatively appear by the plaintiff's own showing; and even in this court, I think the safer and better practice in cases of special jurisdiction is, for the moving papers to show affirmatively that the court has jurisdiction.

The motion papers show that the demand for which this action is brought, arose upon a contract for the payment of money. Therefore, this is not a case where the *subject of the action* is situated within the state; it also appears that the contracts were made, executed, delivered and made payable in Canada; that all the labor done and materials furnished, were under those contracts, and upon work located in Canada, except that a part of the work under one contract, amounting to about \$15,000, extended a short distance over the Province line into this state; and that the plaintiff is not a resident of this state, but a citizen of the United States, and a citizen and resident of the state of New-Hampshire.

The plaintiff claims that this action and proceeding should

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be sustained and upheld on two grounds: 1st. Because the plaintiff, though not a resident of this state, is nevertheless a citizen of the state of New-Hampshire, and if the statute excludes him from having and maintaining this action, it violates the first part of the second section of the fourth article of the constitution of the United States, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and is, therefore, unconstitutional and void. 2d. That the cause of action, or a part thereof, arose within this state.

To plaintiff's first position there are several very conclusive answers. 1st. The right to bring this action against the defendant, a foreign corporation, only exists by statute, and the statute gives it only to residents of this state, unless, &c. If for that reason it is unconstitutional and void, it will not aid the plaintiff; it only leaves the court without jurisdiction, so that no action can be maintained by any person in this state against a foreign corporation. 2d. The statute makes no distinction between the citizens of this state, and those of any other state or country. Our own citizens must be residents to entitle them to bring an action against such a defendant, unless the demand arose within the state; and the citizen of any other state or nation, if a resident, is entitled to the same privilege. The right does not depend upon *citizenship* but upon *residence*.

The second is a more difficult question; still, I am of the opinion that the demand sought to be recovered cannot be said to have arisen within this state. As to the whole demand there can be no doubt. I am not prepared to say, where a part of the cause of action arose within the state, whether a non-resident plaintiff could recover against a foreign corporation; but in such case, I would not dismiss the proceeding at this stage of its progress, but would allow it to proceed, and if jurisdiction was sustained for such portion, let the severance be made upon the trial.

But no cause of action existed for that part of the work done in this state, separate from, and independent of the written

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contract under which it was performed. A cause of action does not exist until the claimant has the legal right to sue. In a contract for labor, &c., no action lies until breach or performance, and neither breach by defendant, or performance by plaintiff, is alleged in this complaint as the basis of plaintiff's right of action.

Again, the case shows, that in October, 1852, the parties entered into a bond for the submission to arbitrators, of all their differences, for work and all other matters arising out of and under the said contracts, whose award and determination should be final and conclusive upon them. While that bond continued in force unperformed, no cause of action existed to either party. That bond was never revoked, but on the contrary a submission was had under it, and an award made, and hence the award is the only cause of action arising out of the aforesaid contracts, now extant between the parties. By it the several matters which composed the plaintiff's claim against the defendant are merged, and cannot be separated into their original elements, unless the award be set aside, and the bond of submission revoked.

After a careful examination and consideration of the case, I think this must be held an action upon the award. The two counts are for the same claims submitted to the arbitrators, and included in the award; judgment is demanded for precisely its amount, with interest from its date, at the rate allowed by law in the country where it was made. In fact no other action could be maintained.

The action being upon the award for labor, &c., performed mostly in Canada, under contracts made, executed, delivered and payable there, by virtue of a bond of arbitration there made, and a submission there had, such award must be regarded as a foreign debt; in other words, not a cause of action arising within this state, in the just sense contemplated by the statute.

The suggestion of Justice HAND, in *Bank of Commerce agt. Rutland and Washington Railroad* (10 How. 8), that "if the subsequent amendment of §§ 134 and 135 of the Code, limit-

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ing the service of summons to cases where the cause of action arose in the state, or the defendants had property here, is to be construed as modifying section 427, then a foreign corporation may be sued whenever it has property here," was not intended as an adjudication of the amendment of sections 134 and 135, but as merely suggesting the effects of such a construction. When that case was before the general term, no such construction was approved. Sections 427 and 134 and 135, each have their special office, and are in harmony with each other. Section 427 specifies the cases in which actions may be brought against foreign corporations; and sections 134 and 135, prescribe the manner of service in such and other actions, and without inquiring whether the action can be sustained.

As neither the plaintiff nor his cause of action are within the provisions of the statute which allows an action to be brought against a foreign corporation, the court has no jurisdiction of the proceedings; the attachment order, authorizing the service of summons by publication, and all acts done under them, must be set aside, and the said orders be discharged and vacated, with \$10 costs.*

*This decision was afterwards unanimously affirmed on the foregoing opinion, by the general term of the Fourth District.

NEW-YORK SUPERIOR COURT.

JOHN O. WOODRUFF and ROBERT M. HENNING agt. THE
NEW-YORK & NEW-HAVEN RAILROAD COMPANY.

The New-York and New-Haven Railroad Company, under the decision in the Mechanics' Bank case (3 Kern. 599), are not liable in an action *on the case for the fraud of Schuyler*, in inducing a loan upon the faith of the false and fraudulent certificates of stock issued by him, and transferred by him on the books of the company (but no new certificate given) prior to making the loan.

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New-York Special Term, January, 1860.

THIS action was brought to recover for fraudulent representations, made by the defendants, through their transfer agent, Robert Schuyler, and involved the question as to the liability of the company, on account of the spurious stock issued by Schuyler. The cause was tried on the 4th and 5th days of December last, before Justice WOODRUFF.

It appeared on the trial, that on the 23d of June, 1854, E. W. Clark, Dodge & Co., as agents of the plaintiffs, were applied to by Gouverneur Morris, for a loan of \$20,000, on a certificate for two hundred and seventy shares of the company's stock, dated that day (being one of Schuyler's fraudulent issues), and that upon the faith of it, and after insisting that the stock should be transferred to them on the books, prior to making the loan, they agreed to make such loan for sixty days, without any knowledge of the true character of the certificate, and believing it to be genuine. The stock was duly transferred into the name of E. W. Clark, Dodge & Co., the same day, by the usual transfer, executed in the office of the company, the transaction being superintended and consented to by the usual clerk in the transfer office, but no new certificate was taken out. The loan was then made, and Morris not having repaid it, and the company having declined to recognize the certificate, or to admit the right of the plaintiffs to the stock, this action was brought, claiming that the company was liable in an action on the case, for the fraud of Schuyler, in inducing the loan upon the faith of the false and fraudulent certificate, and the transfer of the two hundred and seventy shares. A large amount of evidence was given on both sides, but this statement comprehends its substance.

B. C. EMBREE, WALTER RUTHERFORD and S. E. LYON, for plaintiffs.

WM. CURTIS NOYES, for defendants.

WOODRUFF, Justice. If the principles declared in the only opinion which was delivered in the court of appeals, in the

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case of the *Mechanics' Bank* against the present defendants (3 *Kernan's Rep.* 599), are applied in their full extent to this case, I have not been able to avoid the conclusion that the defendants should have judgment, and whatever may be my opinion, uninfluenced by that decision, I do not feel at liberty to say that the court of appeals do not intend to hold all of the propositions, which are there stated, as reasons for the judgment given.

After full reflection and examination of the cases cited, it appears to be most conformable to what is fitting and proper to find the facts proved, apply to them the principles declared in the case referred to, and leave the plaintiffs to resort to the court of appeals itself, if the plaintiffs believe that the circumstances, which, in many important particulars, distinguish this case from the other, will in the judgment of that tribunal, entitle the plaintiffs to recover.

I am satisfied that I cannot assign reasons for a judgment for the plaintiffs, which are satisfactory to my own mind, without conflicting with the opinion of the court of last resort.

I therefore direct judgment herein for the defendants, with costs to the defendants, The New-York and New-Haven Railroad Company, who have appeared and answered herein.

SUPREME COURT.

GEORGE W. COMSTOCK and others agt. ANDREW J. WHITE
and ANDREW B. MOORE.

Without a patent from the government no one has an exclusive right to manufacture and sell pills as a useful invention.

Therefore an injunction will not be granted to restrain an innocent defendant from manufacturing, advertising or selling by any name, designation or trade-mark whatsoever, pills precisely like those manufactured and sold by the plaintiff, and by the name designated by him, or pills composed of the same elementary constituents.

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But where it appeared that the defendants, in having connected themselves with the plaintiffs in the business of manufacturing, advertising and selling pills by a particular name or designation, and having induced the plaintiffs to expend large sums of money in advertising, &c., the pills so manufactured; and then suddenly and without notice, in an unjustifiable manner and apparently from improper motives, severed their connection with the plaintiffs and setting up the same business for themselves,

Held, that an injunction be granted, restraining the defendants from using the name or designation used by the plaintiffs, in designating, marking, labeling, advertising or selling the pills manufactured by the plaintiffs; and also restraining the defendants from using either of the labels or trade-marks of the plaintiffs, or any other labels or trade-marks, made so similar to the plaintiffs' as would be calculated to deceive the public.

If the pills are an innocent humbug, the defendants have no right to deprive the plaintiffs of the reputation and customers which the plaintiffs' money has been the means of acquiring for the pills and themselves; especially as the expenditure was in a great measure induced by the defendants.

New-York Special Term, February, 1860.

MOTION to dissolve injunction. The facts will sufficiently appear in the opinion of the court.

SUTHERLAND, Justice. There is nothing in the papers submitted on this motion, to show that the defendants, White and Moore, or either of them, individually or as partners, ever had in fact, the exclusive right to compound, manufacture and sell, the pills called, "Dr. Morse's Indian Root Pills;" although it does appear from these papers that White and Moore, by the yellow labels or wrappers, used by them around the pill boxes, prior to the partnership between the plaintiffs and the defendant White, represented and advertised Moore as the proprietor of the pills, and stated that none could be genuine without the signature of A. B. Moore.

Neither White nor Moore could have had this exclusive right of manufacture and sale; without a patent from the government; and it is not to be presumed that the government had secured to either of them, or would secure to any one, an exclusive right to manufacture and sell these pills as a useful invention.

The plaintiffs, therefore did not and could not acquire from

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the defendants, White and Moore, or from either of them, an exclusive right to manufacture and sell these pills, either by the written agreement of the 10th of August, 1855, between them and White, or by the written agreement subsequently entered into, between the plaintiffs and White, as partners, and the defendant Moore; and as I find nothing in the papers to show that the plaintiffs have otherwise acquired, or now have this exclusive right of manufacture and sale, I conclude that they in fact have no exclusive right to manufacture and sell the pills.

From aught I see, the defendants and all other persons have the same right, or as good right as the plaintiffs, to mix or combine the chemical, mineral or vegetable constituents composing these pills, round them into shape, advertise and puff them as pills, and a sovereign remedy for nearly all the ills that "flesh is heir to."

Conceding that White, before entering into partnership with the plaintiffs, represented to them that he was the owner or proprietor of the pills, and that Moore represented himself to be the owner or proprietor in the written agreement between him and the plaintiffs and White; the plaintiffs must be presumed to have known the law; and they, therefore, had no right to understand or rely upon such representations, as meaning or affirming that either White or Moore had an exclusive right to manufacture and sell the pills.

Conceding then such representations to have been made by the defendants (White, however, denies that he made any such representations), the fact of such representations having been made by the defendants to the plaintiffs, would not authorize the court to restrain the defendants from the mere manufacture and sale of the pills, because the plaintiffs had no right to rely on such representations as affirming an exclusive right of manufacture and sale.

If, therefore, there is any clause or provision in the injunction in this case as it now stands, which prohibits the defendants, or either of them, from manufacturing, advertising, or selling, by any name, designation or trade-mark whatsoever,

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pills precisely like those manufactured and sold by the plaintiffs by the name of "Dr. Morse's Indian Root Pills," or pills composed of the same elementary constituents, the injunction must be so far modified or dissolved.

I do not see why the defendants have not the same right to manufacture, advertise and sell the pills that the plaintiffs have.

The material questions in this case are, whether the defendants have a right, as against the plaintiffs, in advertising and selling the pills manufactured by them, to use the name or designation, "Dr. Morse's Indian Root Pills," or a trade-mark, label or wrapper, so much like that which the plaintiffs have used and are using, in advertising and selling pills manufactured by them, as to be likely to deceive the customers of the plaintiffs and others, and induce them to believe that they are buying pills made by the plaintiffs, when in fact they may be buying pills made by the defendants.

It is very clear too, that the injunction in this case, must be dissolved, or modified so far as it restrains the defendants or either of them, from using their own names, or the name of either, or the partnership name of A. J. White & Co., in the business of manufacturing, or in advertising or selling these pills, or any other pills.

It appears that the defendants are partners, and that the name of the firm is A. J. White & Co.

I do not see upon what principle the defendants can be prohibited from using their own names, or the name of either, or the partnership name of A. J. White & Co.

If the defendants have the right to make, advertise and sell pills precisely like those made and sold by the plaintiffs, the defendants must have a right to use their own names, or the name of either, or the partnership name "A. J. White & Co.," in the business of manufacturing, advertising and selling them.

The fact, that while the defendant White was in partnership with the plaintiffs in the business of making and selling the pills, the firm name was A. J. White & Co., does not appear to me to affect or impeach the right of the defendants as part-

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ners in the same business, to use the same partnership name, such co-partnership between White and the plaintiffs having been dissolved. Nor can I see how the defendants by their conduct or acts in severing their business connection with the plaintiffs, and in seizing and removing the property of the former firm of A. J. White & Co., however unjustifiable, could forfeit their right in forming the new partnership to use the same firm name.

The remaining questions presented by this motion are questions of more difficulty. I think, however, after a careful consideration of all the facts and circumstances of the case, and a careful examination of the very able briefs submitted by the counsel, and of most of the numerous cases cited by them, that the injunction in this case should be retained and the motion to dissolve it should be denied, so far as it restrains the defendants, or either of them, from using the name or designation, "Dr. Morse's Indian Root Pills," in designating, marking, labeling, advertising or selling the pills manufactured by them. I think the plaintiffs have a right as against the defendants, to the exclusive use of the name, designation or trade-mark, "Dr. Morse's Indian Root Pills," in designating, marking, labeling, advertising or selling the pills manufactured by them.

I am careful to say, I think the plaintiffs have this exclusive right as against the defendants, and I do not mean to say or express an opinion, that they would have this exclusive right as against Dr. Rogers, if he is not really a fictitious person, or as against a stranger, who had never been in any way connected with either the plaintiffs or defendants in manufacturing and selling pills by that name or designation.

I put my opinion on this point, on the special facts and circumstances of this case; and particularly on the conduct or acts of the defendants, in connecting themselves with the plaintiffs in the business of manufacturing, advertising and selling pills by such name or designation, inducing the plaintiffs to expend large sums of money in advertising and puffing with all the verbose exaggerations which belong to the stereotyped quack literature of the day, the pills so manufactured; and

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then, in suddenly, without notice, in an unjustifiable manner, and apparently from improper motives, severing their connection with the plaintiffs, and setting up the same business of pill making, pill puffing, and pill vending for themselves.

I think also, the injunction should be retained, so far as it restrains the defendants from using either of the labels or trade-marks referred to in the complaint in this action, and annexed to it as exhibits "C" "D" and "F," or any other label or trade-mark, so much like these labels or either of them, as to color of ground, vignette, name of pills and general appearance, as to be likely to be easily mistaken for either of those labels.

It appears that the plaintiffs, or the former firm of A. J. White & Co., composed of the plaintiffs and the defendant White, originated the labels or trade-marks, C and D., with the exception of the name of the pills thereon, and exclusively used them or one of them with the name of the pills thereon, during the time the defendants were connected with the plaintiffs, in the business of making and vending pills, and that the plaintiffs are now using the label D.

It also appears, that the defendants, after dissolving their connection with the plaintiffs in the way they did, commenced using the label or trade-mark F, which has the name or designation "Dr. Morse's Indian Root Pills," prominently thereon, and so closely resembles label D. in vignette, color of ground, and in other particulars, as hardly to be distinguished from it.

I look upon the question between the parties in this case as questions of property, of money, of profit or loss.

Both parties have a right to make the pills, and to advertise, puff and sell them. Those who sell the most will make the most money; but in this competition for humbugging the public (if the pills are a humbug), the defendants have no right to deprive the plaintiffs of the reputation and customers which the plaintiffs' money has been the means of acquiring for the pills and themselves, and the expenditure of which money was in a great measure induced by the defendants themselves.

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It does not appear that the pills are positively injurious; it is not to be believed that they have a tithe of the wonderful and benign curative or preventive capacity claimed for them in the eloquent pictorial advertisements of the parties, but it is not for the defendants to say the plaintiffs are humbugging the public, and are, therefore, not entitled to any relief against them, when the defendants have been and still are engaged in the same work.

As to the public—if these pills are an innocent humbug, by which both parties are trying to make money, I doubt whether it is my duty, on those questions of property, of right and wrong between the parties, to stop outside of the case, and abridge the innocent individual liberty which all persons must be presumed to have in common, of suffering themselves to be humbugged.

The injunction must be modified in accordance with this opinion, without costs to either party on this motion.

SUPREME COURT.

BETSEY BERNHARDT, administratrix, &c., agt. RENSSELAER
AND SARATOGA RAILROAD COMPANY.

Although the question of *negligence* is never *presumed* against a party, but must be proved, and is therefore a proper question for a jury, yet, when the testimony is clearly such as shows on the part of a plaintiff, negligence contributing to the injury of which he complains, or as shows the absence of negligence on the part of the defendant, the case is one in which a verdict against the defendant ought to be set aside as *against evidence*; and one in which a *non-suit* should prevent the jury from rendering a verdict which must be set aside.

Albany Special Term, December, 1859.

THIS action was prosecuted to recover damages for the alleged wrongful killing of Gustavus Bernhardt, by the defend-

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ants, in November, 1846, by running a locomotive engine against him in the city of Schenectady, producing injuries of which he died. The defendants by their answer denied all negligence or improper conduct on their part, and claimed that the injuries were occasioned by the negligence of the said Gustavus Bernhardt.

The cause was tried at the Rensselaer circuit, in February, 1859, before Hon. HENRY HOGEBOOM and a jury. At the close of the plaintiff's evidence the defendants' counsel moved for a non-suit upon the grounds—

I. That no negligence on the part of the defendants had been shown.

II. That the evidence showed that the injuries complained of, were occasioned by the carelessness and negligence of the deceased.

III. That the evidence showed that the carelessness and negligence of the deceased, contributed in a material degree to the injuries complained of.

IV. That it did not appear that the plaintiff was without fault in producing the injuries complained of. The court overruled the motion, and the defendants' counsel excepted.

After the close of the testimony, the defendants' counsel renewed his motion for a non-suit, upon the same grounds as above. The court overruled the motion, and the defendants' counsel excepted.

The jury found a verdict for the plaintiff for \$4,000 damages.

The defendants moved for a new trial on a case at the Albany special term, December, 1859.

W. A. BEACH, *for defendants.*

R. W. PECKHAM, *for plaintiff.*

GOULD, Justice. When the plaintiff rested, &c., the injury and death consequent upon it had been proved; and one witness, *Jacob West*, had testified to the occurrence and its attending circumstances. And as his was *all* the testimony that, up

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to the plaintiff's resting her case, tended to show negligence on the part of the defendants' servants, it is probably best to give the substance of what he said. The deceased had just arrived in the cars from Albany, and was between two railroad tracks, walking towards the hotel. The day was very windy, and (it being Thanksgiving day) many people were about there; and a military company was out, so near that its music could be heard. The hat of the deceased blew off, and blew across the railroad track east of him. On this track moving very slowly ("as slowly as it could go,") and moving in a southerly direction—not the same direction in which the deceased was walking—as he was moving at least diagonally to wards, if not at right angles to this track—was a locomotive engine of the defendants. It was just before this engine came along beside the deceased, that his hat blew off, and the deceased started to pursue it, and in so doing stepped upon the track where the engine was coming, just in time to put his person or his foot (the witness cannot say which), within reach of the cow-catcher of the engine; he was hit, thrown down, his left leg was run over by one wheel or two of the forward truck, the engine was instantly stopped, not having run over five feet after hitting the man, and the man was taken up. He died in about a week, from mortification consequent on the amputation of the leg.

So far certainly, there is nothing to show negligence or fault on the part of the defendants. I think it must be safe to say, that any impartial mind would call the occurrence a mere accident.

The witness adds, I *did not hear* the bell ring before he was caught, I was within eight feet of the engine when it passed me (he being a short distance behind the deceased). I think *my attention was first called to the bell ringing* when I was first taking hold of him (the deceased), to take him up, and this adds to the prior testimony nothing, but that *before* his attention was called to the bell ringing, he did not hear it; showing as much as it shows anything, that his attention was called to

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the people and the military and music, as much as to his duty as a porter.

He proceeds, "I did not see the engineer on the engine; the fireman, Anderson, was managing the engine." And, again, "this was about 10 A.M., Anderson was the fireman upon the engine, and had been all that season, *and I had frequently seen him running the engine before.*" The only possible pertinence this can have, is on the claim that there was a *lack of skill or care in the actual management* of the engine; and were that proved, this witness's own testimony shows that *whoever* managed the engine, it was going very slowly, and was under complete control, and was stopped instantly on the man's being caught; and, besides, this very testimony *proves* Anderson abundantly competent to manage an engine moving as that was, and that he was in the habit of so doing; it was within the line of his ordinary employment.

Taking as a basis that negligence (on the part of either defendant or plaintiff) is never presumed, but is to be proved, it strikes me there is next to no proof that there was the least negligence on the part of the man on the engine. No one was on the track, for the engineer or fireman to *see them*, and either stop for or give the alarm; and an engineer is not in law bound to have foreknowledge that a man or fool will see fit to step in front of the engine. The very faint suspicion that the bell did not ring, is all that saves the plaintiff's case from having *proved* the defendants' servants *not* negligent.

But how stands the case as to the deceased? He was in broad daylight on a space open for several hundred feet, having just been a passenger by one railroad train, walking between two railroad tracks, and very near one of them, and finally stepping on one of them directly in front of a locomotive, and not the least intimation is given that he ever pretended to look to the right or to the left, to see if a train was approaching him. His carelessness is proved beyond mistake or contradiction. This was the case when the plaintiffs rested, and the non-suit was moved. On the part of the defence, the testimony is altogether overwhelming that the bell was rung at the

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distance of several hundred feet from where the accident occurred, and very continuously until the accident happened; and the competency of the man Anderson, to manage an engine so running, is fully shown, as well as all the circumstances to prove that it *was actually* under perfect control and properly run.

That in the abstract general way of speaking of things proper to be submitted to a jury, we so class the question of negligence, is perfectly true; and that it is a question more proper to be left to a jury than many other questions, there is no doubt. But where the testimony is clearly such as shows on the part of a plaintiff, negligence contributing to the injury, or as shows the absence of negligence on the part of the defendant, the case is one in which a verdict against the defendant ought to be set aside as against evidence, and one in which a non-suit should prevent the jury from rendering a verdict which must be set aside.

I think the motion for a new trial should be granted.

SUPREME COURT.

**THE BEEKMAN FIRE INSURANCE COMPANY agt. THE FIRST
METHODIST EPISCOPAL CHURCH IN THE CITY OF NEW-
YORK, impleaded, &c.**

An *insurance company* incorporated under the general act for the formation of insurance companies, and by the act allowed to invest money on bond and mortgage, have a right on the purchase of a bond and mortgage, and taking from the assignors an absolute assignment thereof, to include in the purchase and to be paid a claim or debt, for a liquidated sum due from the mortgagors to the assignors, under a special agreement between them, on it appearing on the distribution of surplus moneys realized on the sale of the mortgaged premises, that such debt or claim was absolutely due to the assignors, and intended to be secured by the mortgaged premises.

Where the first Methodist Episcopal church in John street, New-York, repre-

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sented by Richard Keeping, president of the board of trustees, and Barton Wood, one of the trustees, and who had been appointed a committee for the purpose, by a resolution of the board of trustees of the first part, entered into an agreement, as the church or corporation, with Benjamin W. Benson and Wright Gillies, "on behalf of and representing the board of trustees of said church, of the up town party of said church," of the second part, whereby the church as the corporation, agreed to pay "to the party of the second part, the sum of \$3,500, for the expenses of the said up town board, said payment to be made to said Benson;"

And by a separate article of said agreement, it was agreed that "for the information of the down town board, said up town board shall render a true and just account of the property in their hands, and which has come to their hands since the separation, and also of all sums paid by them for property, or on account of said church in John street;"

And by another separate article, that the party of the second part should transfer and deliver to the party of the first part, "all the property, goods, chattels and real estate, which they have at any time acquired by reason of their connection with said church, and while acting or professing to act for said church," &c.

Held, that the agreement to pay the \$3,500, and the agreement to render the accounts, were independent, and not dependent the one upon the other. Also, that the agreement to transfer and deliver the property, was not a condition precedent to the right to the \$3,500.

Held also, that the \$3,500 was payable absolutely, forthwith, or at least on demand, to Benson and Gillies individually, as the legal owners and holders of the claim, and they had a right in law or equity individually, to assign such claim to the plaintiffs.

New-York Special Term, October, 1859.

MOTION to confirm report of referee, in a case of mortgage foreclosure.

E. L. FANCHER, *for motion.*

P. Y. CUTLER, *opposed.*

SUTHERLAND, Justice. The assignment of the bond and mortgage to the plaintiffs, was on its face an absolute assignment, without reservation, condition or trust.

Under such assignment, and as the absolute, unconditional owner and holder of the mortgage, the plaintiffs commenced this action of foreclosure, and by the decree, the whole amount remaining due and unpaid on the mortgage, was to be

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paid to the plaintiffs out of the proceeds of the sale of the mortgaged premises ; the defendant, the First Methodist Episcopal Church, making no defence and putting in no answer.

The proceeds of the sale of the mortgaged premises were more than sufficient to pay the mortgage and the costs of the action.

After decree and sale, the defendant, the church, applies to the court for affirmative relief, setting up, that the assignment to the plaintiffs, was not in fact or in equity absolute, but that the mortgage was assigned to the plaintiffs as security for moneys paid and advanced, and to be paid and advanced by the plaintiffs, to and for the said church ; and that the whole amount which had been so paid and advanced by the plaintiffs, was much less than the amount remaining unpaid on the mortgage for which the plaintiffs had got the decree.

This being admitted by the plaintiffs, and the parties conceding that the plaintiffs had so paid and advanced at different times and in various sums to the amount of \$3,603.66, prior to May 28th, 1857, and the further sum of \$1,236.66, on the 11th of May, 1858, these amounts with interest were ordered by the court to be paid to the plaintiffs, out of the moneys arising from the sale, and the plaintiffs claiming the right to retain, and to be paid out of such moneys the further sum of \$3,500, with interest, as a debt justly due and owing from the church, to plaintiffs as assignees of Benjamin W. Benson and Wright Gillies, which right and debt was disputed by the church ; the court ordered a reference to ascertain as between the plaintiffs and the church, to whom the residue of such moneys belonged and ought to be paid.

After paying the plaintiffs the sums so conceded to have been advanced, with interest, the residue of the money directed to be paid to the plaintiffs by the decree, was about \$3,800.

The referee reports that the sum of \$3,500 belongs to the plaintiffs, with interest from the 19th of January, 1858, and that the plaintiffs are entitled to be paid that amount out of the residue of moneys remaining in the referee's hands. To this report and conclusion of the referee, the church excepts.

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If the \$3,500 with interest, is a debt justly due and owing from the church to the plaintiffs, I am of the opinion that the referee was right in his conclusion, and that his report should be confirmed.

He who asks for equity must do equity ; and there being no contesting creditors, surely if the church owes the plaintiffs the \$3,500 with interest, it would be equitable for them to pay it. What can be more just and equitable than to pay a debt ? And why should the court order the \$3,500 to be paid over to the church, if the church ought immediately to pay it back again ?

The question then is, is the \$3,500 with interest, a debt justly due and owing from the church to the plaintiffs ?

On the part of the church it is insisted that it is not :

1st. Because it was not at and prior to the time of the alleged assignment to the plaintiffs, absolutely owing and payable by the church to any person or persons.

2d. If absolutely payable and owing by the church, and thus a debt, that it was not owned and held by Benson and Gillies, the assignors, at the time of their alleged assignment of it to the plaintiffs, and therefore did not pass to the plaintiffs under the assignment.

3d. If a debt absolutely payable and owing to Benson and Gillies, that the plaintiffs were not authorized by their charter to purchase the debt, and could not accept the assignment, and cannot enforce the claim.

I think at the time of the assignment to the plaintiffs, the \$3,500 was absolutely owing and payable by the church to Benson and Gillies individually, and that the right of action was in them alone as individuals, and not in the "board of trustees of said church of the up town party of said church."

By the agreement of the 19th of January, 1858, between the church as the corporation, of the first part, and Benson and Gillies, "on behalf of and representing the board of trustees of said church, of the up town party of said church," of the second part, the church, as the corporation, agreed to pay "to the party of the second part, the sum of \$3,500 for the expenses of

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the said up town board, said payment to be made to said Benson." By a distinct and separate article of said agreement, it was agreed, that "*for the information of the down town board*, said up town board shall render a true and just account of the property in their hands, and which has come to their hands since the separation, and also of all sums paid by them for property, or on account of said church in John street;" and by another distinct and separate article of said agreement it was agreed, that the party of the second part should transfer and deliver to the party of the first part, "all the property, goods, chattels and real estate, which they have at any time acquired by reason of their connection with said church, and while acting or professing to act for said church," &c.

By recitals contained in said agreement, it appears that a dispute had theretofore existed in the First Methodist Episcopal church of the city of New-York, which had been productive of serious and protracted litigation, and that several suits were then pending between parties known as the down town and up town parties, or by persons claiming to represent said parties; and that the agreement was entered into with a view to settle such suits and difficulties, and put a final end to all controversy.

Now, whether the \$3,500 payable by this agreement by the church to "the party of the second part," and the claim for which was assigned by Benson and Gillies to the plaintiffs, was absolutely owing and payable by the church, at the time of the assignment to the plaintiffs, depends upon the construction of this agreement.

The counsel for the church contends, that the agreement to pay the \$3,500, and the agreement to render the account, and to transfer and deliver the property, are dependent upon each other; and that the \$3,500 was not payable, and no action could be brought to recover the same, until the property was transferred and delivered, and the account rendered.

I think the proofs taken by the referee show that the property was transferred and delivered by Benson and Gillies, or the up town party, substantially in pursuance of the agreement,

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prior to the assignment to the plaintiffs; but it appears that the account never has been rendered; and upon the point whether Benson and Gillies, or the up town party, had ever offered to render it, or the church, or the trustees of the church, had ever demanded it, the testimony is very contradictory.

I am of the opinion, however, that the agreement to pay the \$3,500, and to render the account, are independent, and not dependent the one upon the other. I am inclined to think also, that even the transfer and delivery of the property was not a condition precedent to the right to the \$3,500. By the agreement, the \$3,500 was to be paid "*for the expenses of the up town board,*" not for the property or the delivery of the property, or for the account or the rendering the account, and the account was to be rendered "*for the information of the down town board,*" and not for the \$3,500.

I think the \$3,500 was payable absolutely forthwith, or at least on demand, and, even if a transfer and delivery of the property, or an offer to do so, was necessary before there was a right to make the demand, that the proofs establish that the property was transferred and delivered in pursuance of the agreement.

The \$3,500, then, was owing and payable absolutely at the time of the assignment. To whom? Who had a right to assign the claim to the plaintiffs? Benson and Gillies individually, or the up town party, or the board of trustees of the up town party, of which Benson and Gillies were two?

I think Benson and Gillies were the legal owners and holders of the claim, and had a right individually to assign to the plaintiffs.

The agreement of the 19th of January must be considered as entered into between the church as a corporation, and them individually. The church, represented by Richard Keeping, president of the board of trustees, and Barton Wood, one of the trustees, and who had been appointed a committee for the purpose by a resolution of the board of trustees, entered into the agreement, as the church or the corporation. Benson and Gillies, by entering into the agreement for, or as representing

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the up town party, acknowledged the down town party, or the board of trustees of the down town party, to be the church corporation, or to represent the church corporation. Both of the antagonistic divisions could not be, or represent the church or corporation, each to the exclusion of the other. It follows that the statement of the representative character or capacity in which Benson and Gillies entered into the agreement, must be considered as mere words of description of them as individuals, and as the contracting parties of the second part, and not as showing that they contracted as the agents of the up town party, or of the board of trustees of the up town party, who, not being incorporated as a *party*, or as the board of trustees of a party, were capable of neither suing, or being sued, or contracting.

The debt then was owing and payable to Benson and Gillies, and was assignable not only in equity but at law.

The only remaining question is, could the plaintiffs purchase this claim and take an assignment of it?

They are incorporated under the general act for the formation of insurance companies. By the act they are allowed to invest on bond and mortgage. I am of the opinion that, under the circumstances of this case, the plaintiffs having an absolute assignment of the whole mortgage, the purchase of the claim by them must be considered as an investment on bond and mortgage.

They bought the claim and took the assignment, supposing that the payment of it was secured by the mortgage assigned to them by the church. With reference to the parol trust under which the mortgage was assigned, I think their payment of the claim to Benson and Gillies, and taking an assignment of it, ought to be considered as a further advance made to the church on the security of the mortgage. It is true, the plaintiffs could not make the church their debtor by simply paying the debt to Benson and Gillies without the consent or knowledge of the church, but the plaintiffs bought the claim and took an assignment of it, and the assignment made the church the debtor of the plaintiffs.

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My conclusion is, that the report of the referee must be confirmed.

The question of costs is reserved until the entry of the order.

SUPREME COURT.

ALFRED B. SANDS and GEORGE W. SANDS, executors of DAVID SANDS, deceased, agt. MATILDA CRAFT and CLARK SMITH, executors, &c., of ISAAO L. CRAFT, deceased.

Where an executor dies, having in his hands, at the time, assets belonging to the estate he represented as such executor, although the surviving executors have a right to such assets, they cannot treat the claim as an ordinary debt liquidated and ascertained, to be recovered by a common law action.

Such a claim, not being the subject of a common law action, is not one which the legal representatives of the deceased executor are bound to refer, under the act concerning the duties of executors and administrators, in the payment of debts and legacies.

Brooklyn General Term, December, 1859.

Present, LOTT, EMOTT and BROWN, Justices.

APPEAL from an order at special term, awarding costs to plaintiffs.

JOHN THOMPSON, *for plaintiffs.*

E. Q. ELDRIDGE, *for defendants.*

By the court—BROWN, Justice. Isaac L. Craft, the defendants' testator, was not the debtor of the plaintiffs, or of the plaintiffs' testator in his lifetime, and at the time of his death. He was the co-executor and trustee of the plaintiffs, in regard to the estate real and personal of David Sands, the plaintiffs' testator. He had been selected for this place of trust and confidence by David Sands himself, and, in connection with the plaintiffs, had taken into his hands the trust property, and proceeded to exe-

cute the trust. This was his precise position at the time he died, and his relation to the plaintiffs at the time was that of co-trustee, and not debtor. He owed to the *cestuis que trust* and to his co trustees a duty and obligation, and that was to apply the trust property to the uses of the will, and not to pay them a debt in the popular sense of the term, according to any promise of his, express or implied. He was responsible to the creditors, legatees and next of kin in the same manner and before the same tribunals as other executors, but not otherwise. He might have been cited before the surrogate, to render his accounts and for a distribution of the estate in his hands, and so he might have been impleaded upon the equity side of the court to account, and also for a distribution of the estate upon a bill filed; but not otherwise. He could not have been impleaded in a court of common law, (except possibly by the old action of account), because none of the common law forms of action were the appropriate remedy for that purpose. Before he could be required to pay over the trust property in his hands, his accounts were to be examined and adjusted, and all just allowance for disbursements and commissions were to be made to him, and if any portion of the estate in his hands consisted of securities for moneys invested in pursuance of any directions contained in the will, he would have been entitled to be credited with such investments, and the decree must also have provided for the disposition of such securities. In each of these proceedings he would have been entitled to take his costs out of the trust property, unless he was adjudged guilty of misconduct in the execution of the trust. These observations apply to executors generally, and not to the case of Isaac L. Craft in particular, because nothing appears, upon the papers in this motion, to show what the nature of the trust was. But they tend to show that his position at the time of his death was not that of debtor to the plaintiffs or their testator, in any sum of money for which the former had their action at the common law. His death did not change the nature or extent of his liability.

Section 44 of the act concerning the granting of letters tes-

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tamentary provides, among other things, that upon the death of one of several executors, the remaining executors shall proceed to complete the execution of the will according to law. Assuming that the surviving executors had the right to the assets of the estate in the hands of their co-executor at the time of his death, they certainly could not treat them as an ordinary debt liquidated and ascertained, to be recovered by a common law action. If this could not have been done against the deceased executor in his lifetime, for the reasons I have already given, how can it be done as against his personal representatives after his death? And if the claim was not the subject of a common law action, it was not a claim which his representatives were bound to refer, under the 36th section of the act concerning the duties of executors and administrators, in the payment of debts and legacies. Section 27 directs the executors and administrators to proceed with diligence to pay the debts of the deceased, and prescribes the order of payment. Section 34 provides for the publication of a notice, requiring all persons having claims against the deceased to exhibit the same with the vouchers to the executors by a given day. Section 35 provides that upon a claim being presented, the executors may require satisfactory vouchers in support thereof, and also the affidavit of the claimant that the same is justly due, that no payments have been made thereon, and that there are no offsets thereto within the knowledge of the claimant. Section 36 declares, that if the executor doubt the justice of the claim, he may enter into an agreement to refer the same to three referees, to be approved by the surrogate. And upon filing the same in the office of a clerk of the supreme court, or of a clerk of the court of common pleas, a rule may be entered referring the claim to the referees so named. The court then becomes possessed of the cause, and the referees are to proceed in the same manner, and be subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference. The court may confirm or set aside the report, and the judgment to be entered upon it shall be effectual, in all respects, as if the same had been ren-

dered in a suit commenced by ordinary process. Section 38 puts a limitation upon the recovery of claims disputed or rejected, which shall not be prosecuted within six months after such dispute or rejection.

It will be seen, I think, that the provisions to which I have referred, cannot be applied to the trust moneys or property in the hands of an executor at the time of his death. They contemplate an ordinary debt, for which the deceased was liable in his lifetime, upon a promise express or implied. A debt which may be supported by the oath of the creditor, which is justly due, and which may be the subject of an offset. The claim must be of such a nature as was cognizable in the supreme court, or court of common pleas, at the time the act took effect, and for which the common law courts, as distinguished from the equity courts, afforded an adequate and complete remedy to both parties.

I have already said that the assets of an estate in the hands of an executor, unadministered at the time of the executor's death, may consist of money unexpended, of securities for money invested in the name of the executor pursuant to some direction in the will, or of property unconverted into money, or in process of being converted into money. For all this the surviving executor, if there be one, or the administrator *de bonis non*, if not, would have a just claim against the representatives of the deceased executor. But it is manifest that a reference under the 36th section of the act, with the usual judgment given by the course and practice of the courts of common law, would be an imperfect and inadequate remedy for the settlement and recovery of such a claim.

I am therefore of opinion, that the defendants in this action were not only not bound to enter into an agreement to refer the claim against their testator in this action, pursuant to the 36th section of the statute, but it was their duty to refuse to enter into such a reference, because the plaintiffs' claim was not referable, and there may have been many reasons to think that, in such a proceeding, the rights and interests they represented could not be effectually protected.

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The referee made his award of costs dependent upon the obligation of the defendants to enter into the agreement to refer the claim, and, as I think it was not referable without an action, the order made at the special term, awarding costs to the plaintiffs, should be reversed.

NEW-YORK SUPERIOR COURT.

DANIEL L. PETTEE, assignee, &c., appellant, agt. JOHN ORSER, Sheriff of the city and county of New-York, respondent.

On no ground can an *assignment* of all the property of the firm, for the benefit of creditors, creating a trust and *giving preferences*, be sustained, when made by a *portion* of the members of a *partnership*, without the concurrence and consent of the other acting partners.

New-York General Term, February, 1860.

Present, BOSWORTH, Ch. J., HOFFMAN and MONGRIEF, Justices.

THE action was brought by the present plaintiff, as assignee of the firm of W. & A. Crumbie & Randall, against the defendant as sheriff, to recover from him certain personal property which it was alleged he wrongfully detained.

The case was tried before Mr. Justice SLOSSON and a jury, and the learned judge directed the complaint to be dismissed. Judgment was entered to that effect on the 9th day of June, 1859. A motion for a new trial had been made and denied on the 19th day of May, 1859. From the judgment and the order denying a new trial, the present appeal was taken.

The defendant justified his taking the property demanded, by virtue of an execution issued upon a judgment recovered by Bunce and others, against the firm of W. & A. Crumbie & Randall, on the 7th day of May, 1855, for \$603.89. The execution was put in his hands on the 23d day of May; and,

during the lifetime of the same, he levied upon the property in question.

The goods had been delivered to the plaintiff under the provisions of the Code. The defendant demanded, in his answer, the return of the same, or the full value of the goods to be assessed, with damages.

The jury at the trial assessed the value at the sum of \$797.70.

The judgment entered was in favor of the defendant against the plaintiff for the return of the property described in the complaint, or, in case a return thereof could not be had, for the recovery of the value as assessed by the jury, viz., \$797.70, and also that the defendant recover of the plaintiff his costs, including interest on the verdict.

The assignment under which the plaintiff claimed was dated the 31st day of January, 1855. It purported to be made between William Crumbie, Alexander Crumbie, James McLean and Henry Randall, doing business under the firm and name of W. & A. Crumbie & Randall, of the city of New-York, of the first part, and Daniel L. Pettee, of the second part: it recited the indebtedness of the firm to several creditors, and its inability to pay them in full; and transferred some property specifically mentioned, and also all and singular, every and any other property of whatsoever description, and wheresoever situated, belonging to the said parties of the first part. The trusts and purposes were as follows:

To have and to hold the said estate, and all and singular the premises hereby bargained and assigned, unto the said party of the second part, and his legal representatives, to his own proper use and benefit forever. In trust, nevertheless, and this indenture of assignment is hereby declared to be made upon the trust and confidence, and for the uses, intents and purposes herein specified, that is to say,

First. To sell the estate, and all and singular the property hereby bargained and assigned, at public auction or at private sale for cash, and for the best prices that can be obtained therefor, as soon hereafter as practicable; and to demand, sue for, and collect all debts and demands of every nature whatever,

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that now are or may become due to the said parties of the first part.

Second. Out of the proceeds coming into the hands of the said party of the second part, to pay and satisfy all reasonable fees, costs, charges and expenses which the said parties of the first part now owe, or have been put to, by reason of legal advice tending to and comprehending the making and execution of this indenture, and other papers necessary and proper to carry the objects of this indenture into effect, including the costs and expenses allowed by law.

Third. To pay any costs, charges and expenses (out of the proceeds) to which the said party of the second part may be put or rendered liable in originating, prosecuting and defending suits otherwise in aid and furtherance of the object, intention and execution of this indenture.

Fourth. To pay (out of the said proceeds) the several creditors mentioned in schedule A., hereunto annexed, the amount of their respective debts in full; or, should the proceeds be insufficient for that purpose, to appropriate them to the last mentioned creditors in proportion to their debts respectively.

Fifth. After satisfying the aforementioned trusts, to pay, out of the said proceeds, all the rest and remainder of the creditors of the said parties of the first part, their respective debts in full; or, should the proceeds be insufficient for that purpose, to appropriate the residue and remainder of the said proceeds to the last mentioned creditors in proportion to their debts respectively.

There was also the usual clause constituting the party of the second part the lawful attorney of the parties of the first part.

The instrument was signed with the partnership name and seal, and by William Crumbie and Henry Randall, with their respective seals.

The schedule of preferred creditors shows a liability of \$1291.50, and to numerous other persons in small sums, being, in the aggregate, about \$330,000.

It was proven, on the trial, that Alexander Crumbie was absent from the state of New-York, and on his way to California

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on business of the firm, and that McLean, who resided in Brooklyn, was also absent, and in the island of Cuba on business of the firm, at the time the assignment was made.

It was also proven that such assignment was never executed or ratified by Alexander Crumbie and James McLean, or either of them, and was dissented from by them as soon as they received notice, or had any knowledge, that said assignment had been made.

W. C. NOYES, *for appellant.*

A. J. VANDERPOEL, *for respondent.*

By the court—HOFFMAN, Justice. The learned counsel of the plaintiff has adopted for his premises, as an incontestable proposition, that the power of disposition, as well as the power of acquiring and of binding, is fundamentally inherent in each partner by the very constitution of a partnership. All these attributes of power follow the relation. His argument on this basis is forcible and logical. Every thing of restriction and modification of this absolute authority must be rigorously established, either from positive convention, or express judicial authority precisely to the point. The assumption is of entire authority. The exception must be exactly and strictly limited to what has been expressly declared to be an exception.

But the premises of the learned counsel are far from possessing that entire legal verity which his deduction assumes. Looking only to the ordinary and superficial statement of the relation of partners found in the elementary treatises, his position may appear plausible, if not certain. But looking to the origin of the law of this relation, and the source from which England, and we after England, have obtained it, its accuracy may be questioned.

The law of England as to partners is derived from the *Lex Mercatoria*, and from the civil law. The abridgements of Brooks and Fitzherbert have no such title. Even in Viner's *Abridgment*, there are no cases cited prior to the reign of Charles the Second.

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LORD COKE says that the *Lex Mercatoria* or the Law Merchant is part of the law of England (*Coke Litt.* 11 b.), and Sir WILLIAM GRANT, in *Devaynes agt. Noble*, (1 *Merivale*, 563), observes that the common law, although it professes to adopt the *Lex Mercatoria*, has not adopted it throughout, in what relates to partnership in trade.

In *Molloy's Treatise De Jure Maritimo*, p. 488, (*Book 3, chap. VII, 14*), it is stated, "If two joint merchants occupy their stock, goods and merchandise in common, one of them, naming himself a merchant, shall have an account against the other, naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa et contractu ad communem utilitatem ipsorum A & B. provenient*—*Sicut per legem mercatoriam rationabiliter monstrare poterit*. He cites 10 *Hy.* 71, 16 a *Fitzherbert Natura Brev.* 117, D.

It cannot be questioned that the law of England upon this subject has been drawn primarily from the civil code. As trade and commerce arose, partnerships, and societies, and corporations grew up, and the resort of the untrained lawyers of the age must have been to those sources which the civil law in its plentitude of legislation opened to them. Yet I know of no author, except *Mr. Watson*, who has noticed this fact. (*On Partnership Introduction, XXV.*)

Two questions, then, occur: *First*, does the relation of co-partners imply the existence of a power in each partner, in contemplation of a dissolution, to transfer the whole property to the custody and control of a stranger? *Second*, did the civil law, from which England derived the system, recognize such an absolute power of disposition?

It cannot be said that there is an inherent necessity for the existence of such a power, in order to accomplish the purposes of a partnership. It would be strange to say that what is done in view of a destruction, or effects a destruction of the relation, springs from such relation, or the powers it logically or reasonably implies. The power is justly implied to do everything which tends to aid, to strengthen, and protect. Many of the leading objects of a partnership—the augmentation of capi-

tal, the combination of the varied skill of different persons, the increase of the power of labor, and the expansion of effort and enterprise—can be attained (perhaps less efficiently) without the transmission of the whole authority of the firm to each member, for either the acquisition or disposition of property. In short, whatever tends to preserve, may well be deemed inherent and essential; what pre-supposes, or produces dissolution, is not merely not inherent, but really repugnant to the abstract idea of a single partner's power. The union of will created the relation; the union of will seems necessary to destroy it.

And if we find this view sustained by the civil law, we may venture to be assured of its justness, and be emboldened to found our reasoning upon it.

The civil law did not deem such an authority essential to the nature of a partnership. I may go further, and say that the power of absolute disposition of capital stock resided only in the body of the firm—the *corpus societatis*.

Thus *Gaines* (*Libro 10, ad edictum Provinciale Digest: Corpus juris Civilis, Lib. XVII; Tit. 11, 68,*) says—*Nemo ex sociis plus parte sua potest alienare etsi totorum bonorum socii sint.* The text of *Domat*, as translated by Dr. Strahan, is as follows: "Partners, even those who are in partnership of their whole estate and goods, can alienate only their own share of the common stock, and cannot, by their deed, bind the community, except in so far as it has empowered them."

So *Voet* (*Comm.: Tome 2, p. 205, Pro Socio*), says: "Finally, (and to this the *action pro socio* is suitable), the partner should allow the other partner to use the common property for those purposes for which it was originally furnished by the will of the partners; and conversely, should abstain from all dealings with the common stock, which are new, and repugnant to the primary destination of the partners."

The President *Favre*, in his treatise upon the *Pandects* (quoted by *Troplong De Societe, Tome 12, p. 83*), says: "*Sic enim intellige ut qui societatem, etiam universalem et in perpetuam, contrahit, rem suam communicet socio et in eam partem*

dominii transferat non in perpetuam, sed quantum in tantum durat societas."

The learned author *Troplong*, whom I have quoted, in his commentary upon the 1860th article of the *Code of France*, observes: "It is then the society alone, and not one of its members (without a mandate), which can dispose, by sale or pledge, of what belongs to it. Even more, the preservation of the social capital is a point so important, that the majority cannot force the minority of the partners to sell the property not vendible (*venales*) which composes it."

The word *venales*, which I have translated vendible, means either things held or procured to be sold; or things necessary to be quickly sold from their perishable character. (*Troplong*, article 746, *Tome 13*, p. 229.)

The learned author again says, in commenting upon article 1859, (*Tome 13*, p. 203, n. 714), "this tacit authority (given by each to each other partner,) comprehends everything which is common in a procuration general; the power to purchase; to pay; to receive; to hire or let; and to sell vendible articles." So, in the remarks on article 1860, he quotes a civil law writer as follows: "*Aeque alienare potest nisi fructus aut alias res quae facile corrumpi potest*," and observes, (*N. 747*) "and in this, civil partnerships agree perfectly with the commercial partnerships *en nom collectif*, in which every partner has the tacit authority to manage. Every day we see one partner selling the merchandise, the traffic of which sustains the business. But in commercial partnerships this form of the right of administration is more apparent and more frequent, because they comprise a far greater number of things vendible, and that the incessant traffic of the merchandise is then a condition of existence. But neither in the partnerships of commerce *en nom collectif*, nor in civil partnerships, can one partner dispose of things not vendible."

Once more he observes, that the 1860th article extends to a prohibition of a sale, by one partner alone, of moveables as well as of immovables, and a violation of it will subject the partner to an action *pro socio*; but this concerns the partners

between themselves. In relation to third persons, to whom sale or pledges have been made, the articles 1862, 1863 and 1864, prescribe the rules.

In considering those articles (*Tome 12, p. 239*), he recognizes the great power of one to bind the whole in general partnerships, and states, "these principles are affected by modifications. One is, that the act must not plainly transcend the objects of the union. Suppose one associate sells, in the partnership name, all the immoveables, without which the firm cannot be carried on—is it not clear that the buyer cannot pretend to have the partnership considered the seller, when he has co-operated in an act destructive of the partnership?" (*Tome 13, p. 294*.)

It may be added that the law of France has provided in the fullest manner for the method of winding up a dissolved partnership. It is customary to name a liquidator in the articles. If that has been omitted, he can only be appointed by the unanimous choice of the partners; although a custom exists in many places of giving a majority this power. (*Troplong, Tome 13, p. 484*.) If an arrangement cannot be made, the courts are applied to. (*Ibid.*)

The 1859th and 1860th articles of the *Code Civil* of France is adopted *verbatim* into the Code of Louisiana. (*Article 2841, Civil Code Laws, ed. 1825, p. 588*.)

"1. The partners are supposed to have given reciprocally to each other the power of administering one for the other. What one does is valid even for the share of his partners, without their approbation, saving the right which they or every one of them has to oppose before it be concluded.

"2. Every partner may make use of the things belonging to the partnership, provided he employs the same to the uses for which they are intended (*a la destination fixée par l'usage*), and that he does not use them so as to prevent his associates using them according to their rights nor against the interests of the partnership.

"3. (The third article relates to a contribution to expense.)

"4. One partner can neither dispose of nor make any change

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in the real property of the partnership, although to its benefit, without the consent of the other partners.

"5. In other than commercial partnerships, a partner cannot, as partner only, and if he has not the administration, alienate or engage the things which belong to the partnership.

"Article 1860 of the French Code is, "The associate who is not the administrator, cannot alien or pledge the things, even moveables (*mobilières*), which belong to the partnership."

The law of Scotland follows in the footsteps of Roman jurisprudence. (*Bell's Commentaries*, Vol. 2, pp. 615, 616.) That of Holland is equally guided by it.

I am justified, I think, in adopting the language of *Troplong*: "The maxims of the Roman lawyers, initiated by *Domat*, *Pothier* and others, and expanded by commercial custom, have laid the true foundations of the law of partnership. This was the first of long experience, and of the wise observation of important facts."

It results from this review that, in general, there was no power, as between partners themselves, in one of them to dispose of the common stock absolutely, without the consent of the others; that the unrestricted authority to bind the association was limited to partnership purposes, during the duration of the firm, for the object of carrying it on; that an act, exceeding this limited power, by one partner, might give rights to an innocent purchaser; but if he took the whole property, implying that the partner was destroying the means of carrying on the business, he was not innocent; and lastly, that for the purpose of winding up a partnership the assent of all to a liquidation was necessary, or the tribunals of justice must be resorted to.

In considering the question as affected by the decisions now binding upon this court, we find some positions so settled as not to be open to discussion here.

Deming agt. Colt (3 Sandf. & C. R. 284,) decides, that one partner could not, without the consent of the other, and without consulting him, although present and actively engaged in the business, make a general assignment to a trustee for the

benefit of the creditors without preferences. The principle of the court in that case was, that each partner has a great and powerful interest to see that a proper person is selected to wind up the affairs of the concern; as the judicious administration of the estate will beneficially affect the extent of the liability of each for the debts remaining undischarged, as well as the prospect of an ultimate surplus.

It was treated as settled law, that an assignment under such circumstances, giving preferences, was void. *Havens agt. Hussey* (5 Paige R. 30,) is referred to, and fully sustains the decision.

In *Hayes agt. Heyer*, (3 Sandf. S. C. R. 293), heard before the three other judges of the court, it was announced that the decision in *Deming agt. Colt* might be considered as expressing the unanimous opinion of all the justices of this court, that "a partner can in no case make a general assignment to a trustee for the benefit of creditors, against the consent or without the concurrence of his co-partner, the latter being present, and capable of acting in the matter."

Fisher agt. Murray, (1 E. D. Smith's Rep. 341), in the court of common pleas, is to the same point. The learned judge who delivered the opinion, used the words "under circumstances rendering it impossible to consult the other partners," instead of "the latter being present and capable of acting."

An assignment under such circumstances, giving preferences, would be even more clearly invalid; and so it was considered in *Kemp agt. Carnley*, 3 Duer Rep. 1. *Dana agt. Lull* (17 Vermont Rep. 390,) gives the express sanction, to this point, of two of the judges.

In *Ormsbee agt. Davis*, (5 Rhode Island Rep. 442, 1859), a general assignment, giving preferences, and mainly to the firm of which the assignee was a member, was held void when made by one partner, the other not being shown to have been away or incapable of being consulted. An attaching creditor impeached it.

In *Kemp agt. Carnley* (3 Duer Rep. 1,) the decision was, that when a partner had absconded, and relinquished all control

and management of the concern, an assignment by the other to a trustee, not giving preferences, was valid.

The case of *Mabbett agt. White* (2 *Kern. Rep.* 442,) involves the point: that one partner, when the firm is insolvent, may make a direct transfer of all the partnership property, to a single creditor, to pay the debts, without the knowledge or consent of the other partner, though he was present, or could have been consulted, there being no fraudulent intent to defeat creditors.

The court declare that it was not necessary in the case to decide whether the partner could make an assignment to a trustee for that purpose.

Judges DENIO and JOHNSON dissented, and the former examined the cases with care. I am authorized by one of the learned judges who concurred in the judgment (Judge DEAN,) to say, that he should have come to a different result had the transfer been to a trustee, giving the creditor a preference.

This decision leaves the question, which arises in the present case, open for our determination. It is to be remembered that the absent partners were away upon the business of the firm, and, as soon as apprised of the assignment, repudiated it.

Upon the principal question, then, my own conclusion is that an assignment, without the concurrence of acting partners, of all the property of a firm, giving preferences, is void. It is void because the partners have never vested each other, by force of the partnership union, with such a power. It is invalid, because it controverts the great object of a partnership, the true theory and the most sacred bond of the connection, the furtherance of partnership objects, so long as they can be attained, and the equal power of each to watch over and direct the application of the funds when insolvency overtakes the firm. It is not warranted, in the present case, by the absence of the other partners. That created no emergency which can justify it. The law will sanction an assignment distributing the property among all the creditors, because the law assumes that all the associates will unite in what equity dictates. The law opens another mode to the partner, by throwing the ad-

ministration of the funds into a court of equity. It has been suggested, and the argument receives no slight strength from *Mabbett agt. White*, that as the present assignee was a preferred creditor, (to an amount, indeed, of \$1291.50 out of about \$1620), the transfer must be valid as to his demand, as if the property had been made directly and delivered to him.

It may be answered, if this may prevail, the rule requiring the concurrence of the partners is effectually defeated. Let all the preferred creditors be named trustees, and the object of the assigning partner will, in the great majority of cases, be attained.

Again, upon a direct transfer in payment of a debt, the partners are discharged; the debt is extinguished. This was the case in *Mabbett agt. White*, where a note of the purchaser was given for the balance. Here the partners will be left responsible for any deficiency.

Again, here is a trust created to sell the property, to collect the debts, to pay the expenses of the assignment, and, yet more, to defray the costs and expenses of prosecuting or defending suits connected with the assignment.

In the case of *Ormsbee agt. Davis*, before cited, a subsequent transfer of part of the partnership property to the creditor, in satisfaction, or even security for the debt, was supported. The line of distinction I have pursued in this argument, is strikingly shown in that authority.

I conclude that on no ground can the transfer in question be sustained; and that the judgment appealed from must be affirmed.

SUPREME COURT.

LAFAYETTE COOK, respondent, agt. HEMAN SWIFT, appellant.

On an *appeal* from a justice's judgment to the county court, where either party intend, upon allegations and proofs of *error in fact*, to make an application for a *new trial* on that ground, as provided by the Code; it is error for the county court not to hear the case on both grounds, but only to hear and decide the question of the appeal upon the merits, on the justice's return, without hearing and deciding also the application to set aside the judgment and for a new trial, where the latter question was moved and insisted on.

Erie General Term, November, 1859.

Present, GREENE, P. J., MARVIN and DAVIS, Justices.

APPEAL from judgment of Erie county court, affirming the judgment of the justice.

S. CAVERNO, *for plaintiff.*

G. PARSONS, *for defendant.*

By the court—MARVIN, Justice. The parties joined issue, and the cause was adjourned. On the adjourned day the defendant did not appear, the plaintiff did appear and examined witnesses, and the justice rendered judgment in his favor. The defendant appealed to the county court, stating, as grounds, that the justice erred in calling the suit on the adjourned day, for the reason that the plaintiff did, after the cause was adjourned, in the presence of the court, withdraw the action; and at the same time gave notice to the defendant and his counsel of the same. Also, that the justice had no jurisdiction to render judgment against the defendant. The justice made a return of the proceedings in the action. The defendant procured several affidavits tending to prove a defence, and also that after the cause was adjourned, the plaintiff gave notice to the defendant that he had, or should withdraw it, and that he, the defendant, should make no more costs. Copies of the

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affidavits were served upon the plaintiff, with notice that they would be used, &c. The plaintiff procured several affidavits, and others were made in behalf of the defendant in reply. The record contained all the affidavits.

The case came on for hearing in the county court, and the return and affidavits were read, and the counsel for the appellant was proceeding to argue the case upon the return of the justice, and also his application for a new trial founded upon the affidavits, when his attention was called to a rule of the court to the effect that, when the appeal is founded upon an error of fact, or a new trial is asked for, the same shall be heard upon the affidavits, &c., and be decided before the hearing upon the return of the justice. The counsel for the appellant claimed the right to be heard upon the return and the affidavits at the same time. The court refused to permit this, but would hear the application for a new trial, and decide it, before hearing the case upon the return. The counsel then stated that he wished to argue the appeal upon the return at that time, and proceeded in his argument upon the return. An order was entered by direction of the court, "motion to set aside judgment and for a new trial herein; motion withdrawn and ordered that the defendant pay respondent \$5.00 costs for opposing, and thereupon cause is argued, submitted, and court take the papers." The counsel for the appellant insisted that the affidavits and appeal upon the return should be heard together, and the court should first consider the case upon its merits, &c. These facts are presented by stipulation. The county court affirmed the judgment upon the return of the justice, and has not passed upon the application for a new trial founded upon the affidavits. We agree that the court decided correctly upon the justice's return, and it is not necessary here to state the question made upon that. But should not the court have decided all the questions before it?

By the Code, section 353, the appellant is to serve notice of appeal, stating the grounds upon which the appeal is founded. Section 366, directs as to the judgment of the county court. The judgment of the justice may be reversed for error of law

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or fact. The question as to error in fact may be determined on affidavits, or, in the discretion of the court, upon the examination of witnesses. Thence comes the provision, that if the defendant failed to appear before the justice, and it is shown, by the affidavits served or otherwise, that manifest injustice had been done, and the defendant satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial, before the same or any other justice, at such time and place, and on such terms, as the court may deem proper.

The county court should have heard, and should have passed upon all the errors alleged, whether of law or fact, and upon the application for a new trial. The only way provided by the Code for bringing before the court the errors, either of law or fact, is by appeal. And there must be an appeal when it is intended to make an application for a new trial. So I understand the Code. The provision relating to setting aside or suspending the judgment and ordering a new trial, is contained in the section relating to judgment to be given "upon the hearing of the appeal,"—section 366.

There is but one appeal and but one hearing, and I suppose the appellant may avail himself of all the errors, whether of law or fact, prejudicial to his rights, and may also make the application for a new trial, under the circumstances specified in the Code.

If there is error in law or error in fact, the county court should reverse the judgment. If there is no error in law or fact, the judgment should be affirmed, unless there is an application, under the circumstances specified in the Code, for a new trial. If such application is made, the county court should pass upon the question, and, in its discretion, deny the application or grant it, &c. The judgment will be reversed upon some error of law or fact, or the judgment will be set aside or be suspended, and a new trial ordered; or, notwithstanding all the grounds alleged by the appellant, the judgment will be affirmed.

The mode of bringing errors of fact before the court, is prop .

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only pointed out, I think, in *Hurd agt. Beeman*, (8 *How.* 254), and I think the same practice applicable to this case.

In the present case, the county court has not passed upon the question raised by the affidavits. The court has not exercised its discretion whether the judgment should be set aside, &c., and a new trial ordered. The court refused to hear and pass upon that question, at the time it heard and passed upon the alleged error in law to be found in the return.

It is true that, by the rule entered, it is said that the motion was withdrawn—meaning the motion for the relief founded upon the affidavits; but the stipulation shows that the counsel for the appellant did not withdraw this part of his case, but insisted upon his right to be heard upon the whole case, and that the court should pass upon all the questions. The court refused to hear an argument upon the whole case, and directed the rule to be entered. I think the county court erred in not hearing the whole case, and I think this court should reverse the judgment, simply leaving the cause pending in the county court upon the appeal, and the county court should proceed to hear the case and pass upon all the questions.

Judgment accordingly.

SUPREME COURT.

HARPER and others agt. BANGS and others.

Where the plaintiff recovers judgment on contract against *three* out of *four joint debtors*, he may, under section 375 of the Code, serve a summons on the fourth defendant, who was not served with summons in the original action, to show cause why he should not be bound by the judgment.

New-York Special Term, October 1859.

MOTION to set aside judgment.

INGRAHAM, Justice. The 136th section of the Code allows

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the plaintiff to proceed against such of the joint debtors as are served, and, on recovery, to enter up judgment against all who are jointly indebted.

The 375th section provides for the service of the summons to show cause why they should not be bound by the judgment, or any who were not served with the summons in the original action.

By this section, such summons may be served when a judgment shall be recovered against *one or more* of several persons jointly indebted upon a contract. There is nothing in the summons or affidavit which warrants the granting of this motion. The plaintiff states he recovered judgment against three of the defendants, and served a summons on the fourth, who was not originally served, but who was a defendant in that action. This is in conformity with the 375th section, that contemplates that the judgment should only be considered a judgment against those served, as it says, where judgment is recovered against one or more of the joint debtors. It is sufficient to state what this section requires, and, when the affidavit is made in conformity with it, there is no reason to set it aside.

If the judgment was not properly entered up against all the defendants, it should have been shown by affidavit.

Motion denied with \$10 costs, without prejudice to a renewal of the motion on affidavit.

SUPREME COURT.

CHARLES THWING agt. FRANKLIN THWING and others.

Where, pending the *advertisement of sale* of premises in *partition*, the plaintiff died, and his share passed to his three children, two of whom were defendants in the original action, and the third was made *plaintiff*, by order of the court, as successor in interest to the original plaintiff,

Held, that there was no irregularity in continuing the *advertisement* in the same form as originally commenced, and selling the premises in pursuance thereof.

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New-York Special Term, October, 1859.

MOTION to compel a purchaser to complete his purchase in partition.

INGRAHAM, Justice. Pending the advertisement of sale, the plaintiff in this action died, and his share of the premises sought to be partitioned passed to his three children. Two of them were defendants in the action originally. The third was made plaintiff, by order of the court, as his successor in interest. The advertisement was continued in the same form as originally commenced, and the premises were sold in pursuance thereof. The purchaser now objects to the title, because there was not a new advertisement after the plaintiff was introduced into the cause.

I do not see that such a course was in any way necessary. The Code, section 121, provides for such a case, and authorizes the court to order the action to be continued by his successor in interest. The action is to be continued—to proceed—not to go back and repeat what had been done; but to be continued. If the successor had been made defendant, he might have claimed the right to put in an answer and defend, but the plaintiff could do no such thing; by coming in as plaintiff, he assumes all the former plaintiff's acts, admits the proceedings previously taken to be correct, and adopts them as his own, and by proceeding he is estopped from afterwards denying the regularity of the judgment and subsequent proceedings. There are other reasons why it was not necessary to proceed anew. The judgment of partition and sale was perfect before the death. The rights of the parties thereafter were not in the land, but in the proceeds. Wherever the plaintiff's share vested, the partition was necessary, and the interest attached to the money, the proceeds of the sale, rather than to the land. The same sale and partition must be made as before, and the only difference would be in the distribution of the share of the deceased party, which would be regulated on motion.

I am of the opinion there was no irregularity in the proceeding, and that the purchaser should complete his purchase.

In the Matter of the petition of James W. Beekman.

SUPREME COURT.

In the Matter of the petition of JAMES W. BEEKMAN.

Where the *street commissioner* of the city of New-York falsely certifies the rates at which work is done under a contract for the corporation, the assessment will be set aside, and a new one ordered.

New-York Special Term, October, 1859.

MOTION to vacate assessment for work in setting curb and gutter, &c.

INGRAHAM, Justice. In this case the petitioner moved to vacate the assessment for curb, gutter, &c., in Third Avenue, from 61st to 86th streets, on the following facts: It appeared that on the 24th of February, 1857, the corporation imposed an assessment of \$13,143.84, for setting curb and flagging four feet in width of the sidewalks in Third Avenue, from Sixty-first to Eighty-sixth streets, which assessment appeared as a lien upon the property in question. The corporation entered into a contract with Bernard Callighan to do this work, he being the lowest bidder, but which contract has never yet been fulfilled, but remains in full force. Subsequently, the corporation entered into a contract to do the work, with Charles Devlin, at a greater price than agreed on by Callighan. The then street commissioner, on his return to the assessors, falsely certified the rates at which the work was done.

Mr. Boyle, the surveyor, on his return to the assessors, set forth that the following amount of work had been done:

1285 1-2 cubic yards earth excavation.

55 1-2 " rock

500 " earth filling.

The petition then alleged that this return was afterwards altered so as to read:

4285 1-2 yards of earth excavation.

857 " rock "

8508 " earth filling.

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And that the amount of this alteration formed part of the assessment now charged upon the property. Upon these facts, the petition asked that the assessment be declared void.

The statements of the petitioner being supported by competent evidence, the court must make an order setting the assessment aside, and ordering that the land be assessed for such amount only as would be justly chargeable if the fraud had not been committed.

SUPREME COURT

THE PEOPLE *ex rel.* ISAAC FULLER agt. THE BOARD OF SUPERVISORS OF SENECA COUNTY.

Where a board of supervisors by ballot, under the statute (*Laws of 1845, chapter 280*), designate, by the highest number of votes, one *newspaper* in their county for the publication of the laws of the legislature, and, on another ballot, for the designation of a *second newspaper* for the same purpose, there is a *tie vote* in reference to two other newspapers voted for, there is a selection of one newspaper only; and a *resolution* of the board, declaring one of the two papers last voted for as a second paper to publish the laws, does not help out the difficulty; nor is a *mandamus* against the board of any avail. The defect in such case is in the statute.

Seneca Circuit and Special Term, January, 1860.

MOTION for a peremptory mandamus.

J. K. RICHARDSON, *for relator.*

S. G. HADLEY and J. T. MILLER, *for Supervisors.*

KNOX, Justice. The questions in this case arise in this way. In 1845 (*see Laws of 1845, chap. 280*), the legislature passed the following law: "Section 1. All laws of a general nature, which shall hereafter be passed by the legislature of this state, shall be published in at least two newspapers in each county

of this state where there is, or may be hereafter, two newspapers published; and in one newspaper in each county where but one newspaper is published, or may be published."

"Section 2. All laws of a local nature, which shall hereafter be passed by the legislature of this state, shall be published in like manner in each of the counties interested in the same."

"Section 3. It shall be the duty of each board of supervisors in the several counties of this state, at their annual meeting, to appoint the printers for publishing the laws in their respective counties. The appointment shall be made in the following manner: Each member of the board of supervisors shall designate, by ballot, one newspaper printed in the county to publish the laws, and the paper having the highest number of votes, and the paper having the next highest number of votes, shall be the papers designated for printing the laws. If there shall be but one paper printed in the county, then, in that case, the laws shall be published in that paper."

At their annual meeting, held on the 25th day of November last, the board of supervisors of Seneca county, for the purpose of designating the papers to print the laws as provided in the sections just quoted, proceeded as follows: "Each member of said board, viz., John De Mott, Myron R. Cole, William Dunlap, Peter J. Van Vliet, William Burroughs, John Reed, Samuel R. Welles, George W. Davis, Robert L. Stevenson and Albert Rogers, did designate, by ballot, one newspaper printed in said county. That said ballots were canvassed, after being cast, by said respective members of said board, and on such canvass it appeared, and was declared and determined by said board, that four of said ballots designated the *Seneca Observer*. That three of said ballots designated the *American Reveille*, and that three of said ballots designated the *Seneca County Courier*. That no other ballot was taken, but a resolution was thereupon adopted by a majority of the members of said board then and there voting, and constituting a quorum of said board, as follows: "Resolved, that Charles Sentell and Messrs. Holly and Stowell be, and are hereby appointed, the printers to publish the session laws in said county the ensuing year, and that

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the *Seneca Observer* and *American Reveille*, are hereby designated as such papers in which such laws shall be published."

The relator, assuming the ground that the board had not complied with the statute, and had not appointed printers to publish the laws, or designated any paper or papers for printing the laws, but had adjourned without so doing—an alternative mandamus was ordered by me, at the Cayuga circuit and special term, on the 8d day of January instant. And now, on filing the return of the board, which sets forth the facts above stated, the relator, with the consent of the counsel for the board, without further notice, moves for a peremptory writ of mandamus.

The objections which the counsel for the board take to the issuing of the writ are substantially these: 1st. That, the relator, as the publisher and printer of a newspaper, has no right to the writ any more than any other citizen of the county. 2d. That the board of supervisors have complied with the law, and have appointed printers of the laws. That, having once taken a ballot for that purpose, they have spent their power, and cannot again act in reference to it. 3d. That the mode of proceeding to elect printers is merely directory.

As to the first point, I am of opinion that the relator has no right, as printer and publisher of a newspaper in Seneca county, to the writ any more than all the citizens of the county, but I think any citizen has the right to it in a case like the present. The object of the statute undoubtedly is, to give such publicity to the laws that every citizen may have an opportunity to know them. Any citizen, therefore, may be a relator, in such an application for a mandamus, to enforce the execution of an act of the legislature, passed for the benefit of the public. (19 *Wendell*, 65; 1 *Howard P. R.* 186.)

The case relied on by the counsel for the board, *Yates agt. The Canal Board*, (13 *Barbour's S. C. Rep.* 432), does not sustain their position. That was the case of an individual asking for a mandamus to the canal board, commanding them to approve or disapprove of a contract which had been awarded to him. It was a matter of interest to Yates, the relator individually, but the public at large were not interested in it.

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But the question whether the laws of the land, which all are bound to obey, and the ignorance of which excuses no man, shall be published as directed by the legislature, is a matter of public right. As to the other objections, I have had more difficulty in arriving at a conclusion, and yet, after reading carefully the statute, I am just as confident that the board of supervisors have not discharged the "duty" which the statute imposes, as I am that the relator has a right to the writ. I know of no statute which gives the board of supervisors the power to cause the laws to be published, or to appoint the printers for that purpose, except the one under which they acted in the present instance; and no other statute giving such power was cited on the argument, though one of the counsel for the board earnestly contended that they have such power. This statute is, of course, to be read as a whole, and the same statute which provides that the laws "shall be published," provides that the supervisors *shall* appoint the printers, and prescribes in what manner that appointment shall be made. It can, therefore, be done in no other manner, and, hence, an appointment by *resolution* is an utter nullity. The manner prescribed is, "each member of the board of supervisors shall designate, by ballot, one newspaper printed in the county, to publish the laws, and the paper having the highest number of votes, and the paper having the next highest number of votes, shall be the papers designated for printing the laws."

Here it may be proper to observe, that the statute, after providing that the board may appoint, and prescribing the "manner," says: "And the paper having the highest number of votes, and the paper having the next highest number of votes, shall be the papers designated," &c. In other words, though the supervisors must vote by ballot, the *statute* declares who is elected or designated by such ballot. Now, how was it in this case? The supervisors did precisely what the statute said they should do. They followed the "manner prescribed, and the ballot showed *four* votes for the *Observer*, and *three* votes for the *Reveille*, and *three* votes for the *Courier*." The statute then spoke and said: "The *Observer*, having the highest num-

ber of votes, is one of the papers designated, but there is no paper having the next highest number, but there are two other papers having an equal number—there is a tie. Neither having the next highest number of votes—neither is designated."

As the resolution which the board passed was a nullity, so far as it assumed to designate the papers, it seems to me clear that the "duty" of the board to appoint the printers has not been complied with. And now the question arises, shall a peremptory mandamus go to compel the performance of that "duty?" And just here I ask, whose fault is it that that "duty" was not performed? Did the individual members of the board do anything which they had no right to do? Had they not the right to vote as they did? Most clearly they had, and are without fault. Were in the discharge of their duty, voting, doubtless, as they pleased, and certainly there is no power anywhere to make them vote differently. But as printers were not appointed, there is fault somewhere. That fault is in the law itself—and nowhere else. The "*modus ad-jendi*," prescribed by it for the election of the printers, cannot, in a case like the present one, do it.

When the act was passed, but two great political parties were in the field, and policy dictated the propriety of dividing between those two parties the public printing. By this means, greater circulation would be given to the laws. But since then another party has arisen, and hence the contingency, not contemplated by the statute, which has produced this "dead lock."

Now, this is a writ which the court will issue or withhold in its discretion, and, in the exercise of that discretion in this case, I shall withhold it. It is the fault of the statute that printers are not elected, and it is quite plain to me that, if it were issued, the object sought could not be accomplished.

First. Because I have reason to believe that the members of the board would vote precisely as they have, and then we should have this same "dead lock;" and, *Second.* Because I do not see how, now, after one paper has been designated, as I hold the *Observer* has been, that another can be.

I shall refuse the writ, but without costs to either party.

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SUPREME COURT.

MARGARET ROBERTI agt. THOMAS CARLTON and others.

Liability for the costs of a former suit, shall not prevent the party from prosecuting as a poor person against the same defendant. (3 R. S. 5th ed. 745.)

Held, that this statute is applicable to a married woman who prosecutes as a poor person for damages for injuries to her separate property. (a)

Whether a married woman can sustain an action for damages for personal injuries, without joining her husband as plaintiff, although he is made a party defendant,—*quære?*

New-York Special Term, February, 1860.

MOTION by plaintiff for leave to prosecute as a poor person.

LOUIS H. PIGNOLET, *for plaintiff.*

E. L. FANCHER, *for defendants.*

BONNEY, Justice. The plaintiff is a married woman, and prosecutes this action to recover damages for injuries to her separate property, and also for injuries alleged to have been sustained by reason of the negligence of the first named three defendants.

Upon a petition and papers, sufficient if she were a single woman to entitle her to the relief asked for, she now applies for leave to prosecute as a poor person, under part 3, chapter 8, title 1, of Revised Statutes. She also states that she was married to her husband in Belgium, and they afterwards came

(a) *NOTE*.—The petition of a poor person must show "that the applicant is not worth twenty dollars, excepting the wearing apparel and furniture necessary for himself and his family, and excepting the subject matter of the action, when not in possession thereof." (3 R. S. 5th ed. 744.) The question arises, if the damages claimed by a married woman for injuries to her separate property, of which she is presumed to be in possession, (as she does not claim possession), and which does not include necessary wearing apparel and household furniture, amounts to over \$20—the court have any jurisdiction to entertain the action? as she admits by her claim that she has property exceeding in value \$20; and if less than \$20 damages is claimed, the court certainly have no jurisdiction.—[R.P.]

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to this country ; that he deserted her nearly five years ago, and she has since lived separate and apart from him, and ever since their marriage has maintained herself by her own exertions ; that her husband has no interest in the subject of this action, and refuses to join or be joined as a plaintiff, and has therefore been made a defendant.

The defendants, against whom damages are claimed, oppose the application on two grounds :

1st. They show that the plaintiff, together with her husband, commenced a suit in the New-York common pleas, for the same alleged causes of action, against "The Methodist Book Concern," for which these defendants are trustees, which suit is still pending ; and insist that she should not be permitted to prosecute this action until that suit is discontinued, and the costs of the defendants therein paid. Numerous authorities are cited in support of this objection.

To this it is answered that the defendants in this action are not the same as in the common pleas suit ; and also that the statute (2 R. S. p. 445, § 4,) expressly provides that liability for the costs of a former suit shall not prevent the party from prosecuting as a poor person. This objection is not sufficient to defeat the application.

2d. It is objected that the plaintiff is a married woman, and her husband must be joined with her as plaintiff. One alleged cause of action stated in the complaint is, damage to the separate property of the plaintiff, for which, by the Code, she is permitted to sue alone, (*Code*, § 114, *subdivision* 1), and although she may not be entitled, in this action, to recover damages for the alleged injury to her person, (as to which I now express no opinion), the action may still be maintained. Plaintiff's motion for leave to prosecute as a poor person must be granted.

The defendants, Carlton & Porter, on notice and papers served, also move for an order staying plaintiff's proceedings in this action, until said suit in the common pleas be discontinued and defendants costs therein paid.

For the same reasons above stated, this motion must be denied. No costs are allowed to either party on either motion.

SUPREME COURT.

WILLIAM WHEELOCK, Commissioner of Highways, &c., agt
ABNER HOTCHKISS.

Where judgment is obtained against a defendant sued as a public officer, in a justice's court, and on appeal to the county court the judgment is reversed, and on appeal by the plaintiff to the supreme court, the judgment of the county court is affirmed,

Held, that the defendant is not entitled to *double costs* upon the appeal to the county court; but is entitled to double costs on the appeal to the supreme court.

Erie General Term, January, 1860.

THERE was a recovery in the justices' court against the defendant, who was a *path-master*, and defended his acts as such officer. He appealed to the county court, and the judgment was reversed. The plaintiff then appealed to the supreme court, where the judgment of the county court was affirmed. And the question presented is, to what costs is the defendant entitled?

COOK & LOCKWOOD, *for plaintiff.*

SMITH & LAKIN, *for defendant.*

By the court—MARVIN, Justice. After consulting *Bartle agt. Gilman*, (17 How. 1), *Dockstader agt. Sammons*, (4 Hill, 546), and *Foster agt. Cleveland*, (6 How. 258), I have come to the conclusion that the defendant is not entitled to double costs upon the appeal to the county court, but is entitled to double costs upon the appeal to the supreme court.

In *Dockstader agt. Sammons*, the defendant, a constable, was beaten in the common pleas, and brought error to the supreme court, and the judgment was reversed; it was held that he was not entitled to double costs on the writ of error, he being plaintiff in error, and the statute only giving double costs to a defendant.

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In *Foster* agt. *Cleveland*, the appellant is regarded, for the purposes of the statute, giving double costs as plaintiff, and the respondent as defendant. This being so, the defendant in this case was not entitled, according to *Dockstader* agt. *Sammons*, to double costs upon his appeal to the county court. But as he was respondent in the supreme court, and succeeded, he is entitled to the double costs. Such is the result of the two cases in 4 *Hill* and 6 *Howard*.

It is not necessary to apply to the court, in the first instance, for double costs. The clerk may adjust them. The case, 4 *Wend.* 216, related to treble damages and treble costs. By the statute, the damages are to be treble the amount assessed by the jury. (2 *R. S.* 838, § 1.)

NEW-YORK SUPERIOR COURT.

JOHN F. KENDENBURG and CORNELIUS BUYS, JR., agt.
CHARLES J. MORGAN.

In an action on contract, an execution cannot be issued on a judgment recovered thereon, against the person of the defendant, under section 288 of the Code, unless an order to arrest and hold him to bail was made therein before judgment was recovered.

The only actions in which such an execution can issue, where the defendant was not held to bail before judgment, are those in which the cause of action, established by the judgment-roll, creates *per se* the right, under sections 179 and 181, to arrest and to hold to bail.

Where the right to hold to bail depends upon extrinsic facts, and not upon the nature of the cause of action itself, that right must be asserted and determined before judgment, in the manner prescribed by the Code; and if that be not done, no execution against the person of the defendant can be issued upon the judgment. (*So we thought, notwithstanding the decision in Lockwood* agt. *Van Slyke*, *ante*, p. 45.—*REP.*)

New-York Special Term, February 24th, 1860. Before Bosworth, Ch. J.

THE defendant moved to set aside an execution against his

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person, on which he has been arrested, and is still held in custody. He was sued in this action, as the maker of two promissory notes, and judgment passed against him by default. The complaint is in the ordinary form of one in an action by the payee against the maker of a note. No order has been made to arrest the defendant and hold him to bail. An execution against his property having been issued, and returned unsatisfied, the *ca. sa.* was issued which he now moves to set aside. The motion is opposed on affidavits tending to show, and which, for the purpose of this motion, it was assumed do show, that the defendant fraudulently contracted the debt for which said two notes were given; and the plaintiffs insist that, the debt having been fraudulently contracted, the case is one in which the defendant might have been arrested under sections 179 and 181 of the Code, and, therefore, an execution against his person is a matter of right, under section 288.

The defendant insists that, this being an action on contract, he cannot be arrested until after his liability to be arrested has been determined in the manner prescribed by *chapter 1, title 7, of part two of the Code*, and that, unless an order for his arrest has been made before judgment, no execution in such an action can be issued against his person.

R. M. HARRINGTON, *for defendant.*

N. J. WYETH, *for plaintiffs*, cited and commented on *sections 179, 181 and 288 of the Code*; 6 *How. P. R.* 315; 5 *id.* 467; 2 *Seld.* 560; 3 *Abb.* 230; 5 *Seld.* 209; 18 *How. P. R.* 45; 17 *id.* 481.

BOSWORTH, Ch. Justice. Section 178 of the Code declares, that no person shall be arrested in a civil action, except as prescribed by that act, but that such provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831, or any act amending the same.

The latter act declares (*Laws of 1831, p. 396, § 1.*) that no person shall be arrested or imprisoned on any civil process, or

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execution, * * *, in any suit instituted for the recovery of any money, due upon any judgment or decree, founded upon contract, or due upon any contract, express or implied, &c.

Section three of that act, provides a mode of obtaining a warrant to arrest the defendant in such suit, on establishing one of the several grounds for it enumerated in section 4.

By that act, no defendant can be arrested in any action founded on contract, except upon an application to the designated judge or officer, and upon making proof to his satisfaction, of some one of the grounds which, by that act, authorizes the issuing of a warrant.

One of those grounds is the same as that alleged in opposition to the granting of the present motion.

Section 179 of the Code, subdivision 4, enacts that "the defendant may be arrested, as hereinafter prescribed," (§ 179), when he "has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought." (*Id. subdivision 4.*)

The order of arrest must be obtained from a judge of the court in which the action is brought, or from a county judge, (§ 180), and cannot be granted without an affidavit establishing a cause of action, and that the case is one of those mentioned in section 179. (*Id.* 181.) And even then it cannot be granted, unless such an undertaking be given as section 182 requires; and, by section 183, it must be made before judgment.

If a defendant be so arrested, he may move to vacate the order of arrest, before the justification of bail. (§ 204.) But section 204 gives the right to make such a motion, and section 205 regulates the practice upon it. The provisions of the Code (cited above,) are in entire harmony with the general spirit of the provisions of the act of 1831. By either act, a defendant cannot be arrested, except upon an order or warrant of a judge; and the one cannot be made, nor the other issued, except upon proof, satisfactory to him, of some one of the specified grounds authorizing it.

Under the act of 1831, the defendant may controvert any of the facts and circumstances on which such warrant issued, and

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if the plaintiff fail to establish his allegations, the defendant will be discharged. (*Laws of 1831, p. 397, § 7.*)

Under the Code, a defendant arrested may move to vacate the order of arrest, and have the truth of the allegations on which the order was made investigated and determined. They must of necessity be determined before the justification of bail, and, if they are determined in favor of the defendant, the order will be vacated.

As the provisions of the Code regulating the matter of holding a defendant to bail, in an action upon contract, declare in terms that such provisions shall not affect the act of 1831, (*supra*), I think they should be so construed as to be consistent in their spirit and design, when such a construction will do no violence to the natural and ordinary import of the words used in either statute.

Unless there be some other section of the Code having a different meaning, or indicating a different intent, the provisions already cited, in connection with the non-imprisonment act, indicate very clearly that no defendant can be arrested or imprisoned, in an action founded on contract, except in pursuance of an order of a judge of the court in which the action is pending, or of some one authorized to perform his duties.

The non-imprisonment act declares that he shall not be, and the Code does not provide that he may be, unless such a provision is contained in section 288. When the latter section declares that an execution may be issued against the person of the judgment debtor, "if the action be one in which the defendant might have been arrested, as provided in sections 179 and 181," it contemplates that the question, whether he might have been so arrested, has been determined before such execution is attempted to be issued.

If the record of the recovery show a cause of action established, which, *per se*, gives a right to hold to bail, then the existence of such fact is determined by the record itself. In such a case, the decisions are quite uniform that a *ca. sa.* may be issued, though no order to hold to bail had

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been procured. (*Howard's Code*, § 288, and cases cited in the notes.)

If the right to hold to bail is wholly independent of the cause of action, then, whether the case be one in which the defendant might have been arrested, as provided in sections 179 and 181, must be determined before judgment, by obtaining an order of arrest, and on the motion to vacate it, if the propriety of such order be not submitted to.

If this be not so, then the law on this subject presents some strange anomalies. If arrested, as provided by sections 179 and 181, the defendant must be served with a copy of the order of arrest, and of the affidavit on which it was made. (*Code*, § 184.)

If a plaintiff may issue a *ca. sa.* at his peril, under section 288, when there has been no order holding the defendant to bail, the latter cannot certainly know, at the time of his imprisonment, on what ground the plaintiff will seek to justify such arrest.

Whether it is on the ground that he fraudulently contracted the debt, or that he has removed or disposed of his property with intent to defraud his creditors, or is about to do so, he cannot be informed until the facts alleged and relied upon, in answer to his motion to set aside the *ca. sa.*, are stated.

These he cannot controvert, unless the motion is allowed to stand over for that purpose. By pursuing the practice prescribed, to determine whether he is liable to be arrested, although he may be arrested on *ex parte* affidavits, yet those affidavits must specify and establish the grounds on which the order is sought. A copy of those affidavits must be served on him at the time of his arrest, and he may move on them, or on them and others, for his discharge.

I think it a forcible consideration in support of these views, that the Code contains no provision for determining, after judgment, and after the debtor has been arrested on a *ca. sa.*, whether he is liable to be imprisoned or not. The scope of the provisions of the Code, as a whole, brings me to the conclusion that, where the right to arrest depends upon some fact

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wholly extrinsic to the cause of action itself, the question of such liability must be determined by obtaining an order to arrest, or by proceedings to be had upon such an order, obtained before judgment.

Where the cause of action, *per se*, gives the right to arrest or imprison, although the question of such liability may be provisionally determined before judgment, yet it is to be absolutely determined by the judgment itself.

This construction of section 288 makes the provisions of the non-imprisonment act, and of the Code, as to holding to bail in actions on contract, harmonize with each other, and makes the system prescribed by the Code furnish some security to a defendant against being arrested for an unknown cause, and against being subjected to the necessity of seeking exoneration from an unjust imprisonment, without having any remedy prescribed to which he may resort.

The legislature having made special provisions that a defendant shall not be arrested on an execution issued on a judgment founded on contract, and that he shall not be arrested in an action on contract, unless certain prescribed proceedings have been previously had; and even in that case, having provided how and when he may have the question of his liability to be arrested determined; I think it has limited the plaintiff to the method so prescribed, as the only one by which it can be investigated and settled. My conclusion is, that the execution was issued without authority, and contrary to law, and should be set aside with costs.

SUPREME COURT.

PETER FRANCISCO, appellant, agt. THE PEOPLE OF THE STATE
OF NEW-YORK, respondents.

The act of 1847, (*chapter 69, Laws of 1847, § 91*), which provides and declares an offence of misdemeanor for any person other than a Hell Gate pilot to pilot a vessel through the Hell Gate, does not apply to, nor include within its provisions, the case of the pilot of a steamtug towing a canvas through the Gate.

The act in question, by the term piloting through the Gate, has reference to a person on board of the canvas, and actually controlling its helm. Its intentment was to include only such persons as were actually *on board, piloting and directing the ship or vessel*.

The master of a canvas has the right to employ any motive power he may see fit, and for that purpose may make use of another vessel or boat, or a steamtug; and if such use cannot be made without necessarily devolving, upon those who may apply the power, the selection of the course, and a certain position, or indeed, all the charge and conduct of the vessel in that course; still, if the *bona fide* object of the employment be the moving power, the person so employed is not a pilot, and has not the conduct and charge of the vessel, as such, within the meaning of the act. The case of *Reiley agt. Scott* (7 *Mason & Wesley's Reports, p. 93.*) cited, commented on, and approved.

Held, that a charge by the court below that the defendant, while controlling the movements of the tug and its master spirit, was committing an act of pilotage, was erroneous, and a conviction was quashed.

New-York General Term, November, 1858.

Before DAVIES, SUTHERLAND and HOGEBROOM, Justices.

THE appellant was indicted in the general sessions, and convicted of a misdemeanor in violating the provisions of chapter 69, Laws of 1847, relating to the Hell Gate pilots.

That act provides that there shall be appointed, by the governor and senate, fit and proper persons to act as pilots for the safe pilotage of vessels through the channel of the East river, commonly called Hell Gate. The act provides for compensation for such service, and also provides that any pilot who shall first tender his services to any vessel passing through the Gate, and whose services shall not be accepted, shall be entitled to demand and receive half pilotage.

✓ The act further provides that if any person, other than a Hell Gate pilot, shall pilot for any other person any vessel of any description through the channel of the East river, commonly called Hell Gate, he shall forfeit and pay the sum of thirty dollars for each offence; or, on conviction thereof, shall be deemed guilty of a misdemeanor, and shall be punished as such; and the act also declares that it shall not be construed as applying to steamboats.

The defendant was the pilot of the steamtug H. Minturn, which was used as such in the harbor of New-York. On the 7th of May, 1857, the two schooners called the George, and the Humming Bird, were lashed to the steamtug Minturn, one on each side, and thus taken through Hell Gate by the defendant, he being on the steamboat and piloting it, and making signals to those on board the schooners to change their helms to conform to the movements of the steamer.

It is conceded that the piloting of the steamer was no offence under the act, for it is expressly excepted from its provisions. But it is insisted on the part of the people, that the act of taking the two schooners through the channel, in the manner stated, was an act of pilotage within the meaning of the act, and which it has made an offence.

D. McMAHON, *for defendant*, contended that the mere act of towage was supplying a motor to the canvas—it was furnishing a breeze of wind. That the defendant, by acting as pilot of the steamtug, was the mere director of the motive power thus furnished. He also contended that the term pilot, within the act, evidently had reference to unauthorized persons taking upon themselves the management of the helm of the canvas, *on board of it*, with the intent to evade the act; whereas, the tugging a vessel was a *bona fide* employment, and was not necessarily in conflict with the pilot law, as a Hell Gate pilot might still be on board. Counsel cited the act of 1857, section 29, relative to Sandy Hook pilots, where it is expressly mentioned, that any master of a steamtug, who shall tow a vessel without a licensed pilot on board, shall be liable, &c., &c.

If towage *per se* was pilotage, this last provision was unnecessary, for it would be an infringement of the statute of 1853, which imposed penalties on persons piloting through Sandy Hook, unless authorized, &c.

The counsel also cited the case of *Reilley agt. Scott*, (7 *Mees. & Welsby*, p. 93); *Bouvier's Law Dictionary*, title *Pilots*; *Low agt. The Crown*, (*R. McCharlton's R.* 302); *Creole & Sampson*, (2 *Wallace Jr. R.* 512); *Gibbons agt. Ogden*, (7 *Wheat. R.*); and commented on the refusal of the recorder below to charge as requested by defence; and insisted that the act of 1847 was unconstitutional, as the defendant was licensed under the general act of Congress on steamtugs, August 30th, 1852. (10 *Statutes at Large*, p. 63.)

JOHN MCKEON, *for the people*, insisted that the towing in question was a plain violation of the statute of 1847, and that the act was constitutional, and distinguished this case from the one cited in the English Exchequer.

He cited *Webster's Dictionary*, title *Pilot*; *Blunt's Commercial Dig.* 465; *Reeves agt. The Constitution*, (*Gilpin's Reps.* 579); *Cooley agt. Wardens of Philadelphia*, (12 *Howard's Supreme Court, U. S., Reports*, 299).

By the court—DAVIES, P. J.—The duties of the pilots authorized by the act to be appointed, and to act as pilots for the safe pilotage of vessels through the channel, commonly called Hell Gate, are prescribed by law; and any person not such pilot, who shall *pilot* any vessel, is made subject to the penalties of the act. *Bouvier's Law Dictionary*, (Vol. 2, p. 337,) defines a pilot to be, first, an officer serving on board of a ship during the course of a voyage, and having the charge of the helm, and of the ship's route; and, secondly, an officer authorized by law, who is taken on board at a particular place, for the purpose of conducting a ship through a river, road or channel, or from or into a port.

This definition would seem to carry the idea that the pilot is to be *on board* the ship piloted; that he is not, in the legal

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sense, a pilot, unless on board the ship which he is conducting through a river or channel. Could he be said to be a pilot if he stood on the shore and directed the course of the vessel by signals; or ran along the banks of the stream, and by words or signs controlled and directed the course of the vessel navigating the stream? We think not; and that the intentment of the act was to apply to pilots on board, piloting and directing the ship or vessel while on board of it. The defendant was conducting the steamtug through the channel of the East river, as he lawfully might do. The two schooners, which it is claimed he piloted, were lashed to the steamboat, and must necessarily obey its every motion. As a consequence, they were piloted through the channel; and so they would have been if placed on the deck of the steamer. It is true, the persons on the schooners had to obey, and did obey, signals given to them by the defendant while on board the steamer. He might have given the same if on the land, but we do not see that this circumstance determines that he was piloting the schooners.

We have not seen any decision of our courts upon the proper construction to be given to this statute, upon the point now presented for consideration. But a case has been decided by the English court of exchequer upon a similar statute, which seems to us of high authority and quite controlling. The language of the English statute is, (6 *Geo. 4th, chap. 125, § 70*), "Every person assuming or continuing to act *in the charge or conduct of any ship or vessel*, without being a licensed pilot, after any licensed pilot shall have offered to take charge of such ship or vessel, shall forfeit," &c.

It will be seen that the language of this statute is more comprehensive than ours, and is not so technical in the terms used. Ours is "to pilot," or "piloting;" theirs, "to act in the charge or conduct of any ship or vessel." *Reilly agt. Scott* (7 *Meeson & Welsby's Reports*, page 93,) was an action to recover a penalty, incurred under this statute, for doing an act like that for which the defendant in this case was convicted of a misdemeanor.

Baron PARKE, in delivering the opinion of the court, says :
“The first question arising in this case is, whether the defendant had the charge of the ship within the meaning of the pilot act? We are of the opinion that he had not. These words are to be understood in the sense ascribed to them in other parts of the act; that is, they mean the taking the charge and direction *as a pilot*, whose appropriate and indeed sole duty it is to select the course, and take the management and conduct of the vessel for the purpose of directing her in that course. The master of a coasting vessel may, if he pleases, perform that duty himself; but if he chooses to employ another for that purpose, he must employ a licensed pilot; and an unlicensed person taking that duty on himself by command of the master, when a licensed pilot offers his services, would be liable to the penalty in the 70th section.

“But the master is not precluded from employing any *moving power* which he may please—he may make use of another vessel or boat, or a steamtug, for that purpose; and if that cannot be done without necessarily devolving upon those who may apply the power, the selection of the course and a certain position, or indeed all the charge and conduct of the vessel in that course, still, if the *bona fide* object of the employment be the moving power, the person so employed is not a pilot, and has not the conduct and charge of the vessel, as such, within the meaning of the act. If, indeed, the real object in any case should appear to be to obtain the assistance of the skill of a pilot, and to give him the charge and conduct of the vessel under some colorable duty then assigned to him, the case would be within the act; but in the present instance it is expressly found that the steamtug was *bona fide* hired for the purpose of conducting the vessel into the river, and the court in that case hold that no penalty was incurred.”

It was assumed, on the trial of the defendant, that he was engaged in the business of towage. If not, the 5th and 6th requests of the defendant to the judge raised the question, and brought the case within that in the English exchequer. The fifth request was that, if the jury believed that the act done by

the defendant on this occasion was of towage only, the defendant must be acquitted, for that offence was not contemplated by the act, and the judge so charged, with this qualification, that if the defendant directed and controlled the movements of the steamer, and was the controlling spirit, then his act is one of pilotage. To this the defendant excepted, and in holding that the defendant, while controlling the movements of the tug and its master spirit, was committing an act of pilotage, we think the learned recorder erred. So also we think he erred in refusing to charge that the steamtug Minturn, being a steamboat propelled by steam, had a right to tow vessels through Hell Gate, without being subject to the laws relating to pilotage; and that, by the 10th section of the act of 1847, steamboats were excepted from its operation.

We think that, upon the facts, the defendant has not been guilty of any offence under the act of 1847, and that there was error in refusing to charge in the particulars mentioned as requested, and that, consequently, the conviction must be reversed.

Judgment against the people.

SUPREME COURT.

ZERA BRADLEY agt. LEWIS D. FAY and JOSEPH LOVELL.

The former practice in allowing or refusing *double costs* to public officers, must still prevail. Therefore, where such officer has *joined* in a plea or answer of justification with a party who is not entitled to double costs, no such costs can be allowed him. It is different where the officer and the other party answer *separately*.

The statute, in giving double costs "to any other person," in actions against him for any act done by the command of such officers, or in their aid and assistance, applies only to third persons, and not to a party to the action or proceeding in which the process originates.

Cayuga Special Term, November, 1859.

MOTION for double costs to the defendant Fay, who took the goods, as sheriff of Steuben county, by virtue of an attachment. The defendants put in a joint answer, justifying the taking of the goods for which the action was brought, by virtue of an attachment in an action in this court, in which the defendant Lovell, and one Colles, were plaintiffs, and Franklin W. Bradley was defendant. It is alleged, in the answer, that the defendant Lovell acted in aid of the sheriff. The defendants, on the trial, had a verdict in their favor.

E. G. LAPHAM, *for defendant Fay.*

S. H. HAMMOND, *for plaintiff.*

JOHNSON, Justice. It is now settled that the statute, giving double costs to officers in actions brought against them for acts done by them in their official character, is not repealed or affected by the Code. (*Bartle agt. Gilman*, 18 N. Y. R. 260; *S. C.*, 17 How. 1.) The former practice, however, in allowing or refusing costs in such cases, must be held still to prevail, and no such costs can be allowed to an officer who has joined in a plea of justification with one who is not entitled to double costs. (*Wales agt. Hart*, 2 Cowen, 426.) It is different where the officer and the other party answer separately.

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The reason of this seems to be that, upon a single verdict, in a joint answer, there can be but one taxation of costs, and, the other party having no right to double costs, the officer joining in the answer of justification, and having a joint verdict, loses his right to such costs. (*Row agt. Sherwood, 6 Johns. 109.*)

It is alleged, in the answer, that the defendant Lovell, in what he did, acted in aid and assistance of the sheriff only. The statute gives double costs "to any other person," in actions against him for any act done by the command of such officers, or in their aid and assistance. But this, I apprehend, applies to third persons only who are called upon by the officer to assist him, and who have no connection with, or interest in the execution of the process, and are not parties to the action or proceeding in which the process originates.

The defendant Lovell, being one of the plaintiffs in the action, was acting in his own behalf, and not solely in aid of the sheriff, and is not one of the persons for whose benefit the statute was intended, and had no right to double costs.

The motion must, therefore, be denied.

UNITED STATES DISTRICT COURT.

WILLIAM D. REED agt. THE STEAMBOAT NEW-HAVEN AND
THE NEW-YORK & ERIE RAILROAD COMPANY, claimants.

1. *Held*, that the rules of law for the government of steamers in respect to a lookout, are well settled, and are of stern necessity.
2. That the steamboat did not have such a lookout as is required by the law, (10 *How. R. 585*), and, by that failure, a *prima facie* case is made out against her, which stands, unless rebutted by clear and satisfactory proof.
3. That it is the duty of a sailing vessel, meeting a steamboat, to hold her course, and of a steamboat to avoid her. (10 *How. 583*; 12 *How. 463*.)
4. That, upon the facts, both vessels were mistaken as to the course of the other, as, instead of being on parallel lines, they were crossing each other's track.
5. That it was an error in the pilot of the steamer not to have known the true course of the sloop, and to have proceeded with unslackened speed.

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6. That the sloop had the right to keep her course, and also a right, when she had good reason to apprehend a collision, as the steamer had taken no measures to avoid it, to endeavor herself to escape from it, and if, in making such attempt when peril was threatening, she did not adopt the most judicious course, such error of judgment would not be charged against her as a fault. (*The Genesee Chief*, 10 How.)
7. That the evidence in the case does not rebut the *prima facie* case made out against the steamer, by her failure to have the lookout required by the rules of law, but rather strengthens it, and she must be held liable for the damages.

Before Hon. C. A. INGERSOLL, D. J.

THE statement of the case appears in the opinion of the court.

D. MCMAHON, *for libellant*.

W. R. BEBEE and D. B. EATON, *for claimants*.

INGERSOLL, D. J. The libellant, the owner of the sloop George M. Dallas, files his libel against the steamboat New-Haven, to recover the damages which the Dallas sustained by a collision with a barge in tow of the steamboat, on the night of the 7th day of May, A. D. 1855.

The collision took place at about ten or eleven o'clock at night, a little below Piermont dock, on the North river, and about twenty-five miles from New-York. The night was dark and cloudy; sailing vessels could not be descried at a greater distance than a half or three-quarters of a mile, and at that distance could be seen but imperfectly.

The shores of the river—it being, where the collision took place, about two miles wide—could not be distinctly seen. The wind, at the time, was about east, south-east. The course of the river where the collision took place was about north and south. Piermont dock is on the west side of the river, and runs out from the shore, on the flats, about a mile. On the afternoon of the same day, the sloop sailed from a place some distance up the river, loaded with a cargo of brick, and bound to Brooklyn. At the time of the collision, she was on her larboard tack. She had been on that tack for some time. When the steamer hove in sight, her sheets were off a few

points. She was of about seventy-five tons burden, and was manned by a captain, two deck hands, and a cook. Towards evening of the same day, the steamer sailed from New-York, bound to Piermont, with three partly loaded barges in tow; one being on her starboard side, and the other two on her larboard side. The outer larboard barge struck the sloop on her larboard quarter, about twelve feet from her stern, making a hole in the sloop about six feet wide, in consequence of which the sloop soon filled with water and sunk. The steamer was forty-eight feet wide. One of the barges on the larboard side was thirty-two feet wide, the other forty feet. The barge on the starboard side was forty feet wide. The barges in tow of the steamer were under her sole control and direction. It is claimed, in the libel, that the collision which caused the damage to the sloop was occasioned by the fault and neglect of those having the charge of the navigation of the steamer; such fault and neglect are charged as attributable to the steamer, in several respects. Among other charges is the one that, at the time of the collision, the steamer had not a proper and competent lookout stationed on board.

The rules of law for the government of steamers, in respect to a lookout, whilst traversing waters in the night season, where sailing vessels are accustomed to navigate, are now well settled by the decisions of the highest court in this country. These rules are of stern necessity. The safety of navigation requires that they should rigidly be adhered to; and if they were universally regarded, many collisions, which from time to time take place, might be avoided.

The supreme court of the United States, in the case of *St. John* agt. *Paige*, (10 *Howard*, p. 585), there laid down the rule on this subject: "A competent and vigilant lookout stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, is indispensable to exempt the steamboat from blame, in case of accident in the night-time, while navigating waters on which it is accustomed to meet other water-craft." And the court, in the same case, lay down the rule that the pilot-houses in the night,

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especially if dark, and the view obscured by clouds, is not a proper place for the lookout. The same court, in the case of *The Genesee Chief* agt. *Fitzhugh et al.*, (12 Howard, page 463), say: "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout, besides the helmsman; and whenever a collision happens with a sailing vessel, and it appears that there was no other lookout on board the steamboat but the helmsman, or that such lookout was not stationed in the proper place, or not actually or vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault." And the same court, in the last mentioned case, page 462, have defined what, in law, is meant by a proper lookout. They say, by a proper lookout, we do not mean merely persons on deck, who look at the light, but some one in a favorable position to see, stationed near enough to the helmsman to communicate with him, and to receive communications from him, and exclusively employed in watching the movements of vessels which they are meeting or about to pass. These rules are plain, and easily to be understood. Steamers are bound to obey them; especially are they bound to regard them when, on a dark night, they are navigating such a stream as the North river, at all times thronged with various kinds of sailing vessels, and other description of water-craft. And if they do not obey them, and a collision happens with a sailing vessel, it must be regarded as *prima facie* evidence that it was occasioned by their fault; and the question in this part of the case is, did the New-Haven obey these salutary rules of navigation?

At the time of the collision, the pilot of the New-Haven was at the wheel. He had been at his post in the pilot-house, which was on the forward part of the upper deck, about fifty feet aft of the stem of the vessel, from the time she left New-York.

There were also, at the time of the collision, in the pilot-house, the captain of the steamer and a hand. There were no other persons on any portion of the forward part of the boat.

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The captain was not stationed there to act as a lookout. He was not then exclusively employed in watching the movements of vessels which the steamer was about to meet or pass. He saw the sloop when she first hove in sight. He immediately turned his back to her, and saw nothing more of her till just before the collision, when his attention was attracted to her by a remark of the pilot, accompanied by the ringing of the bells to slow, stop and back. The hand in the pilot-house was not stationed there to act as a lookout. He was sitting down, and did not see the sloop when she first hove in sight. He first saw her just before the collision took place. His attention was first directed to her by the remark of the pilot—just before the ringing of the bells to slow, stop and back—at a time when a collision seemed almost inevitable. There was a man sitting on the forward part of the first larboard barge. He was not one of the ship's company which belonged to the steamer. He was not stationed there by order of any one on board the steamer. He had nothing to do with her navigation. He took his position there as one of convenience. He was in no sense of the term, as the law understands it, a lookout. There was, therefore, no lookout stationed on board the steamer. Those having charge of her navigation disregarded the injunction which the law imposed upon them.

There was a peculiar necessity, in the present case, that that injunction should be obeyed. The steamer was propelling through the water, on a dark and cloudy night, at the rate of seven or eight miles an hour, where sailing vessels and other water-craft are constantly navigating, a huge mass of one hundred and sixty feet in width, when the utmost circumspection was required, in disregard of this sound rule of law. The consequence is, that a *prima facie* case is made out that the collision complained of was occasioned by her fault and negligence. That *prima facie* case must stand, unless the respondents rebut that *prima facie* case, thus made out, by clear and satisfactory proof. Upon them rests the burden.

In considering the question whether the respondents have rebutted this *prima facie* case, so made out against the steamer,

by clear and satisfactory proof, certain rules of law should be kept in view. As a general rule, when a steamer meets a sailing vessel, whether close hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her. (*St. John agt. Paine et al.*, 10 *Howard*, 583.) Judge NELSON, in the last mentioned case, in speaking of the obligation of steam vessels in relation to sailing vessels, says: "They possess a power to avoid a collision not belonging to sailing vessels, even with a free wind; the master having the steamer under his command, both by altering the helm and by stopping the engines. They are of vast power, and, when compared with crafts on our rivers and internal seas propelled by sails, exposing the latter to inevitable destruction in case of collision, and rendering it at all times difficult, and not unfrequently impossible, to get out of the way. Greater caution and vigilance are, therefore, to be exacted from those in charge of them, to avoid the dangers of the navigation. This justly results from the superior power to direct and control the course and speed of the vessel, and the serious damages consequent upon a failure to avoid the danger." And Chief Justice TANEY, in the case of *The Genesee Chief*, (12 *Howard*, 463), says: "She (the steamboat) has command of her own course and her own speed, and it is her duty to pass the approaching vessel at such a distance as to avoid all danger, when she has room; and if the water is narrow, her speed should be checked so as to accomplish the same purpose."

It has been a great object of the parties, during the trial, to discredit the testimony of the witnesses on the opposite side, and to make it appear that they have testified falsely. This course is taken upon the assumption that the two vessels, when first discovered by each other, were pursuing their respective courses on parallel lines—the steamer going up the river, and the sloop coming down. Upon this assumption, it would follow that the witnesses, on the one side or the other, when testifying as to certain facts, had perverted the truth, and, upon this assumption, their testimony is not reconcilable. But this is not the correct assumption. The true assumption is, that

when the two vessels were first discovered by each other, they were pursuing courses which, if continued, would make them cross each other's track, though, for some reason or other, this was not noticed either by the captain or pilot of the steamer. Upon this latter assumption, the testimony of the two sets of witnesses who were on board the two vessels, as to the important facts in the case, is consistent with the truth, and entirely reconcilable, though some of the opinions which they may have respectively expressed may be founded in error. It does not appear that the steamer was steered by the compass. From the evidence, as given, it is fair to infer that she was not so steered; and it is very clear there was no compass on board the sloop.

Those having charge, therefore, of the steamer and the sloop, say—and the evidence shows they were ignorant of the exact heading of their respective vessels—when the sloop was first seen by the pilot of the steamer, she was, as near as he could judge, from about a half to three-quarters of a mile off. The pilot and the captain both state that the sloop, when first seen, was over the starboard bow of the steamer. There can be no doubt that, in this respect, they tell the truth. The pilot—assuming that the steamer was then heading a little east of north—formed the opinion that the sloop was east of the steamer, and, assuming further that the sloop was pursuing a parallel course with the steamer, and in an opposite direction, formed the opinion, if both vessels kept their course, that the sloop would pass him, on the starboard side, at a distance of from forty to sixty yards. Acting upon this supposition, he took no precautionary measures to avoid a collision, but continued on, regardless of the sloop, at the rate of speed which he had been going. In this latter assumption and opinion, if not in the former, the pilot was mistaken.

The steamer had her lights up. When these lights were first seen by those on board the sloop, they were apparently about a mile or a mile and a half distant. The steamer, when first seen by those on board the sloop, was over the sloop's larboard bow. This is testified to by those on board the sloop, and

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there can be no reasonable doubt that in this respect they tell the truth. Those on board the sloop, upon the assumption that the sloop was heading to the south, formed the opinion that the steamer was to the east of the sloop; and that, if she kept an up-river course, she would pass her to the east, as the sloop, when first discovered by those on board the steamer, was over the starboard bow of the steamer; and as the steamer, when first seen by those on board the sloop, was over the larboard bow of the sloop, it follows conclusively that the two vessels could not have been sailing on parallel lines, but that the heading of each was such that, if they kept their course, they would cross each other's track. The sloop was not bound to know this, for she had a right to keep her course, and in such a case it would be the duty of the steamer to avoid her; but the steamer was bound to know this, and at an early period to take precautionary measures to avoid a collision. Those having charge of her, if they knew the true course of the two vessels, must have known there was great danger of a collision. For some reason or other, they did not know that the two vessels were bearing so as to cross each other's track. They supposed that the two vessels were sailing on parallel lines, and that as the sloop, when first seen, was over the steamer's starboard bow, that she should pass clear of her to the east; and, acting upon this supposition, she kept on her course ahead, with no slackened speed.

It was a great error on the part of the steamer, to have been ignorant of the true course of the two vessels. If the night was so dark that there was difficulty in ascertaining the true course of the sloop, then it was the duty of the steamer to have slackened her speed until danger from that cause was over. To this want of knowledge on the part of those having charge of the steamer, is mainly to be attributed the disaster now made the cause of complaint.

The sloop kept the course she was on when first seen by the steamer, until she got within about sixty to one hundred and fifty yards of her. Those having charge of the sloop then apprehending danger, with the view of avoiding it, kept her away

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a little. The pilot of the steamer, seeing this movement, rung his bells to slow, stop and back, and hove his wheel hard a-port. When within about thirty yards of the steamer, the sloop bore more away. The sloop escaped a blow from the steamer and from the first barge, but was struck by the outer barge in the manner described; and such fault is charged by the respondents upon the sloop, in that the captain was not on deck attending to his duty, and that the sloop ought not to have borne away; that, by so doing, she crossed the track of the steamer, and that that caused the collision.

The captain of the sloop, in the early part of the evening, went down in the cabin to sleep, leaving his vessel in charge of the two deck hands. At about the time the steamer hove in sight, he came on deck again, was on deck when the sloop bore away, and gave orders to have her bear away. As has been shown, it satisfactorily appears that, when the two vessels first saw each other, they were heading so as to cross each other's track. At the time the sloop bore away, no measures had been taken by the steamer to avoid a collision. The sloop had a right to keep her course. She had also a right, as she had good reason to apprehend a collision, and as the steamer had taken no measures to avoid one, to make an attempt to escape from it; and if, in making such attempt when peril was threatening, she did not adopt the most judicious course, if it should have been more judicious to tack than to bear away, such error of judgment, if error it was, should not be charged to the sloop as a fault. The language of the court, in the case of *The Genesee Chief*, is peculiarly appropriate to this part of the case. The court say: "We do not deem it material to inquire whether the order of the captain, (of the sailing vessel), at the moment of collision, was judicious or not." He saw the steamboat coming upon him; her speed was not diminished, nor any measures taken to avoid a collision; and if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the steamer to have placed him in a situation when there was no time for thought; and she is responsible for the consequences. She

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had the power to have passed at a safe distance, and had no right to place the sailing vessel in such jeopardy that the error of a moment might cause her destruction and endanger the lives of those on board ; and if an error was committed under such circumstances, it was not a fault. The evidence in the case does not rebut the *prima facie* case made out against the steamer, by her not having stationed on board a proper lookout, but rather strengthens it. The collision was occasioned solely by her fault, and she must be responsible for the damages.

The decree of the court is, that the libellant do recover of the steamer the damages which he has sustained by the collision ; and that it be referred to a commissioner, to ascertain and report what the damages are.

From this decree, appeal was taken to the circuit court of the United States, and was argued by MR. EATON *for appellant*, and by D. McMAHON *for appellee*. The court rendered the following opinion and decision, affirming the decree :

NELSON, C. J. This libel was filed by the owners of the sloop to recover damages for a collision a little below Piermont dock, on the North river, on the night of the 7th of May, 1855, in which she was run down and sunk by one of the barges of the tow of the steamboat New-Haven. The night was somewhat dark and cloudy. The sloop was coming down the river, the wind about S.S.E., with a moderate breeze ; the steamboat ascending, making for Piermont dock. The hands on the sloop testify that she was coming down on the west shore of the river, and that the steamboat was ascending east of her, and took a sheer to the west that led to the disaster ; while the hands of the steamboat aver that she was ascending on the east shore, and that the sloop was coming down east of them, and suddenly changed her course towards the west, crossing the bows of the steamer. Judge INGERSOLL, who heard and determined the case below, held the steamer was in fault in not having a competent lookout stationed in the forward part of the boat, whose duty it was to descry, and report

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to the proper officer, vessels approaching at the earliest possible moment. She had no lookout, in the maritime sense of that term. The pilot and captain were on the pilot house, which was some fifty feet from the stem of the vessel; at the time of the collision, the pilot was at the wheel. There seems to have been no person on board whose especial duty it was to look out for vessels ahead. We have repeatedly held that this neglect was a fault, in the navigation of a vessel, that would charge her in case of the happening of a collision.

It is insisted, for the respondents, that the sloop was in fault also, for not keeping her course, and that the sudden change of it led to the collision. We are not satisfied that any change of course took place on her part until the danger of a collision was impending; and further, we think, if there had been a competent and vigilant lookout on the steamer, the disaster might have been avoided. Judge INGERSOLL has examined the evidence with great care, and has stated the reason at large for his conclusion in charging the New-Haven; and we fully concur in the views he has taken of the case, and the result to which he arrived. It is a matter of surprise that masters of steamboats should be found so frequently neglectful of their duty, in omitting to station a lookout at a proper place on the boat, especially in dark and cloudy weather, after the necessity of the observance of it has been so repeatedly enforced by the courts, and several condemnations of vessels for the omission. The duty was most manifest in this case, considering the weather, and the moving mass, upon the river, of one hundred and sixty feet width, comprising the steamboat and her barges.

Decree affirmed.

SUPREME COURT.

FRANK F. FOWLER, plaintiff in error, ads. THE PEOPLE,
defendants in error.

It is not necessary, on an indictment for obtaining money on *false pretences*, to prove all the false pretences or representations *alleged* in the indictment. If any *material portion* of them is proved, it is sufficient.

The *declarations or admissions* of a party are equally good as evidence, whether made *before or after* the offence charged against him.

It is not necessary, even on an indictment for perjury, to prove the *identical words or language* of the party charged; it is sufficient to prove *substantially* what he said, and all that he said, on the point in question.

The prisoner in this case, having been indicted for obtaining money by false and fraudulent pretences, in selling a false passage ticket from New-York to Bremen, and it appearing, in evidence, sufficient to submit the question to the jury, that the prisoner was acting in concert with another person, who acted as his clerk, and who carried on the negotiation, and consummated the sale with the applicant, in the German language, in the presence and hearing of the prisoner, although it was not shown that the prisoner understood the German language, *Held*, no error in the court, in charging the jury, to say that it was not necessary, in making out false pretences, that *words alone* should be used; the pretences might be gathered from the *acts* as well as the words. A falsehood could be *acted* as effectively, in many instances, as it could be spoken.

New-York General Term, March, 1860.

Present, SUTHERLAND, ALLEN, BONNEY and LEONARD,
Justices.

MOTION by defendant for a new trial on exceptions.

JAMES M. SMITH, JR., *for the plaintiff in error.*

N. J. WATERBURY, *district-attorney, for the people.*

By the court—LEONARD, Justice. Fowler was tried, at the last term of the court of oyer and terminer in the city of New-York, on an indictment charging him, together with John Gilbert, with obtaining money by false pretences from Christian Heine.

The substance of the charge is, that Fowler and Gilbert, on the 14th of October, 1859, at the said city, knowingly and falsely pretended and represented to the said Heine that a certain instrument in writing, of which a copy is hereinafter set forth, was a genuine ticket, entitling him to a passage to Bremen, that there was a steamship called the Ammonia, then lying in the port of New-York, and was then about to leave, and that Fowler and Gilbert were regular authorized agents of said ship, and authorized to sell passages thereon, and that the office occupied by them, at the corner of Chambers and West streets, was the regular office of the company and line to which the said pretended steamship belonged.

That Heine, believing the said false pretences and representations, and deceived thereby, paid Fowler and Gilbert thirty-five dollars.

The indictment then charges that these pretences and representations were false, negating each of them, and that Fowler and Gilbert received the money with a felonious intent to cheat and defraud Heine, the complainant.

At the trial, the evidence showed that Heine arrived in this city from Illinois, by the cars, on the morning of the 14th of October, 1859, and was taken by a stranger, whom he has not since seen, to the office of the prisoner Fowler, at the corner of Chambers and West streets, where were Fowler and Gilbert, the former behind the counter and the latter in front, four or five feet apart. The stranger said in English, when they went into the office, that Heine wanted to go to Germany. Gilbert then continued the conversation with Heine in the German language, and nothing was said or done by Fowler till after the money was paid, although he was present and saw all that took place. No evidence was offered to show that Fowler understood the German language. Heine informed Gilbert that he wanted to go to Bremen in a steamer, and inquired the price. Gilbert told him the price was \$35, which Heine concluded to pay, and Gilbert then filled up the blank certificate or ticket in question, on the counter, within three or four feet of Fowler, and delivered it to Heine, who paid thirty-five dollars therefor,

to Gilbert, in gold and silver coin. Fowler came round the counter and took the money from Gilbert, put it in a bag, and then put it in his pocket. When he took the money, Fowler said, "I put all that money in one bag." Gilbert told Heine he wanted to conduct him to the steamer the next day, that the ticket was all right for Bremen. This was after the money was paid.

The ticket or paper in question was then read in evidence, under objection and exception on the part of the prisoner. It was printed in red letters in an ornamental style, (except the parts italicised, which were written), and its contents were as follows :

"London, Liverpool, Havre, Hamburg and Bremen }
 Packet Office, Corner of Chambers and West streets. }
 Paid \$35.00.

Where passages can be engaged on reasonable terms, on regular Packet ships, including provisions.

NEW-YORK, Oct. 14, 1859.

This entitles the bearer, Mr. *Christian Aene*, to a passage this present voyage, hence to *Bremen*, in the *Steam Ship Ammonia*.

F. F. FOWLER.

To Mr. F. F. Fowler.

To be exchanged 186 West street.

Not transferrable.

No passage money returned."

Fowler had a sign up at his office "General Passage Office for California, Liverpool, London, Havre, &c.," but his name was not on the sign. Fowler had been engaged in selling passenger tickets two or three years. Gilbert and the prisoner were together at the office daily.

Fowler, after this transaction, went to the police office, on being sent for in relation to this charge, without any arrest, and, in conversation with Mr. Hartman, an interpreter employed at the police office, stated in substance, as near as witness could recollect, that this ticket had been sold at his office to accommodate a miner; that he was sorry, and wanted to give a good ticket; that a mistake occurred in writing the steamer's name.

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There was no steamer of the name of "Ammonia," running from this port to Europe. The Hamburg steamship company have two steamships running from New-York to Hamburg; one of them, called the Hammonia, was in Hamburg on the 14th of October, and the other, the Teutonia, was then here, but left on the 15th of October, bound for Hamburg. The office of this line was at 151 Broadway.

The instrument in question, would not have entitled a person to a passage on any vessel of that line. Neither Fowler nor Gilbert were entitled to sell tickets for that line.

There were two offices in Greenwich street authorized to sell tickets to be exchanged at the office of this line, and papers are there issued similar to the one in question. Germans often show such tickets at this office, but they are not taken. This line pays a commission of two dollars to persons bringing them a steerage passenger, who pays them \$35 for a ticket.

There is a line of steamers running from New-York to Bremen, of which Guelf & Co. are the agents, but no vessels called the Ammonia or Hammonia, or Teutonia, belong to that line. There are four steamers belonging to this line, called the Hudson, the Weser, the Bremen and the New-York. One of the agents of this line testified, that this paper in question would not entitle the holder to a passage to Bremen. Tickets, in the regular and ordinary course of business, are not directed to the parties themselves.

The line have one outside agent only, who sells certificates for passage, which are exchanged at the principal office. His office is at 75 Greenwich street. His certificates are not in the form of this one in question. They are addressed to the firm of principal agents. Heine went to the office of Fowler the next day, after the Teutonia had sailed, and saw Gilbert there, but not Fowler. Heine never asked Fowler for a ticket, after he got the paper in question.

The outside agent of the Bremen line, who keeps his office at 75 Greenwich street, was called as a witness for the prisoner, and testified that he had known such papers, issued by Fowler, to be exchanged for tickets. Never knew one of Fowler's certi-

ficates to be repudiated. If Gilbert had asked for another vessel, he could have had it. He also stated, under objection and exception by the counsel for the prisoner, that if a passenger had come with the paper in question, without money, he would not have taken it, and have given him a ticket. If he had known the paper came from Fowler, he would.

Another witness, on behalf of the prisoner, testified that he had seen such papers as the one in question, issued by Fowler, in the hands of several persons, and that, when presented, they always got good tickets for them.

Numerous questions in regard to the admissibility of evidence were raised at the trial, and an exception was also taken to a portion of the charge of the judge, and also for his refusal to charge as requested, which have been argued before the court at general term, and which are now to be considered.

Early in the trial, but after it had been ascertained that the witness (Heine) and the clerk (Gilbert) conducted the business at Fowler's office, in his presence, in the German language, which Fowler did not understand, so far as the evidence showed, Heine was asked to tell what was done by the German—referring to Gilbert.

It was objected by the counsel for the prisoner, that the acts of Fowler only were evidence, as the language used was German, and it had not then been proven that Fowler had done any act.

There had been sufficient evidence already given to make it probable that Gilbert and the prisoner were acting in concert. The nature and effect of Gilbert's acts could have been understood by Fowler, although he was ignorant of the language used; particularly so, if the two were acting in concert. This the jury were to decide. If there were any doubt as to the sufficiency of the evidence, showing the probability of their concerted action when the question was asked, it was removed by the proof, which immediately followed, that the prisoner himself took the money which Heine paid for the ticket.

The next objection urged was to the admission of the docu-

ment, which was alleged to have been sold to Heine as a ticket for a passage to Bremen.

The grounds of objection urged were, that it had not been proved that Fowler signed it, or knew its contents, or authorized it to be signed.

This paper was the subject of the alleged fraud. It was not necessary to prove that the prisoner signed it. If he knew what his clerk was doing, or about to do, it was quite sufficient. Whether he had this knowledge or not, was for the jury to inquire, if there was sufficient evidence to justify a submission of the question. The probability that the prisoner knew and authorized the acts of Gilbert, was strong. Gilbert was his clerk. Heine was brought there, and announced, in English, as a person wishing to go to Germany. The joint occupation of the office by Fowler and Gilbert, and the business ostensibly carried on; the possession of a blank of this description, showing previous preparation; the filling up of the blank within three feet of the prisoner—whether his name was then signed by Gilbert, or had been previously signed, he was near enough to see and read the paper, and to see the signature; the act of the prisoner in receiving the money, the price of the passage to which the paper purported to entitle Heine. All these facts tend to prove that the prisoner understood or authorized the transaction, and was quite sufficient to warrant the admission of the document as evidence. It was a step in the trial of the question at issue. It was the subject of the alleged false pretences. The pretences were made in regard to that paper, if at all, and whether they were false or not remained to be proved.

The third exception arises on the admission of evidence of the declarations of the prisoner, in regard to this very transaction, tending to show a *scienter*. The objection was, that the evidence was irrelevant; not that it was unduly obtained, for which there was no ground, the conversation being wholly voluntary, and while the prisoner was not even under arrest. The question is too plain to admit of argument. The only reason urged is, that it took place after the offence, and cannot

act retrospectively. It is a sufficient answer to say, that it was the prisoner's own version of his alleged offence. The declarations or admissions of a party are equally good as evidence, whether made before or after the offence.

The fourth objection and exception was to the admission of the substance of what the prisoner stated in the conversation last referred to, after the witness had declared his inability to give the exact language of the prisoner.

This objection is also untenable. Even on an indictment for perjury, it is not necessary to prove the identical words or language of the party charged; it is deemed sufficient to prove substantially what he said, and all that he said, on the point in question. (3 *Greenleaf*, § 194; *Snell* agt. *Moses*, 1 *J. R.* 99.)

The fifth exception was taken to a question addressed to the agent of the Hamburg Steamship Company, as follows: "Would that paper [handing him the paper hereinbefore set forth] have entitled a person to a passage on a steamer of your line?" This witness had previously testified that there was no steamer by the name of Ammonia running from here to Europe; that there is one called the Hammonia, belonging to the line of which he was agent; that this steamer was at Hamburg on the 14th of October; that there was a steamer called the Teutonia, also belonging to this line, which was in this port on the 14th of October, and sailed for Hamburg on the next day. The previous witness had testified that Fowler had stated to him, in a conversation about this ticket, or certificate issued to Heine, that a mistake occurred in writing in the steamer's name, and that Fowler, or some one in his behalf, had stated that the name of the steamer Teutonia ought to have been in the place of "Ammonia."

The objection was made on the ground that the inquiry was irrelevant.

The question was pertinent, and the evidence called forth was relevant, to show that the excuse which Fowler offered for the sale of the paper in question to Heine, as a ticket for a passage to Bremen, was false, and thereby also to further show his fraudulent intent.

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An inquiry was also made of this witness, whether Fowler or Gilbert, or either of them, were authorized to sell tickets for this line of steamers? to which the prisoner's counsel took the sixth objection and exception at the trial, on the ground of irrelevancy; but no reference was made to it at the argument of the writ of error, or upon the points of the prisoner's counsel; and, as the objection is manifestly untenable, no further reference to it here is required.

The witness, Heine, was recalled by the district attorney, and asked this question: "After you went into the office with the man who went with you from the cars, what was the first thing said in the office?"

To this inquiry the counsel for the prisoner took the seventh objection and exception, on the ground that the conversation at the office was already shown to have been in German, and that the prisoner had taken no part in it; and, it not having been made to appear that he understood it, he could not be affected thereby.

There had been much evidence previously given tending to show a concerted action between Fowler and his German clerk Gilbert—quite too much to justify the court in omitting to give such question to the jury. It was of little consequence what language was used, if Fowler knew, beforehand, what the purport and object of Gilbert's conversation was to be with those applicants who spoke in the German tongue. The first words which the witness uttered, in answer to this question, were unimportant as evidence for the people. The evidence was, that the man who went with Heine from the cars to the prisoner's office, said, in English, that Heine wanted to go to Germany. Fowler understood this statement. He was the principal—Gilbert the clerk. True, the clerk talked with Heine in German, but he filled up a ticket, in Fowler's presence, in the English language, to which his name was then, or had been previously, affixed; and a ticket in blank was at hand, previously provided and printed in an attractive style. The clerk received the money for the ticket, then filled up in Fowler's presence, and handed it immediately to Fowler, who,

apprehending an arrest, shortly afterwards stated, as an excuse, that the name of the steamer was filled in by mistake. These, besides many other circumstances, all tending to show a concerted action between the prisoner and his German clerk, appear quite sufficient to authorize the ruling which was made on this question.

The eighth objection and exception also arose upon the second examination of Heine. He was asked, "Was anything else said inside the office before you left?"

The prisoner's counsel objected, that no foundation had been laid to charge the prisoner with the acts or declarations of the clerk. The same reasons for admitting this question existed at the trial, which were applied to the last objection. The answer was, however, favorable to the prisoner. It was, that the clerk said he wanted to conduct Heine, the next day, to the steamer, and afforded one of the principal points in the prisoner's defence. It also appeared, by the next reply of the witness, that this latter conversation occurred after the money had been paid. It was also a part of the same conversation in which the alleged fraud was committed. No request was made to the court to strike out the evidence, or to instruct the jury to disregard it. There was nothing in the reply to give rise to any ground of complaint on the part of the prisoner.

The ninth and tenth exceptions were also taken to inquiries put to this witness by the district attorney, and admitted, after objection on the part of the prisoner.

No reference was made to them at the argument of the writ of error, or on the points. Heine went to the office the next day, and asked for a ticket.

The inquiry manifestly had reference to the memorandum at the bottom of the ticket—"To be exchanged 186 West street"—and to the intent of the prisoner in the transaction with which he is charged. The answer was not unfavorable to the prisoner, and the objection may be safely dismissed without further remark.

The eleventh exception arose on an objection to an inquiry, made by the court, of the outside agent of the Bremen and

Hamburg lines of steamers, who had his office at No. 75 Greenwich street, referred to in the foregoing statement of the facts of the case. He had, previously to the inquiry, testified that, if Gilbert or Fowler had come to his office with Heine, on the morning the steamer sailed, and presented the paper put in evidence, he would have given him a ticket for a passage on the first steamer that went to Bremen.

It is not very apparent how this evidence could be considered as in any degree conclusive to show the good faith of Fowler in the transaction, inasmuch as no obligation rested on the witness to supply a ticket for this paper, and no evidence of a claim on Fowler would arise from the possession of it by the witness; and if he had furnished a ticket therefor, it would have been an act purely voluntary on his part. It was a matter resting exclusively in his own conscience, whether he would have given these parties a ticket or not, and if the statement was false, there was no means of detecting it, except by further inquiry from him. He might possibly have come to an entirely different conclusion, if the request for a ticket had, in fact, been made upon him, although, when he gave his evidence, he honestly believed that he would have furnished it.

The question put by the court, to which the eleventh exception was taken, was this: "If a passenger had come with that paper, without money, would you have taken it, and given a ticket to him?" The answer was, "No, sir!" The prisoner had evoked similar evidence to establish a belief with the jury that his intent was honest. The inquiry put by the court was for the same purpose of ascertaining the intent of the prisoner. If the paper in question was, in fact, delivered to Heine as a ticket entitling him to a passage to Bremen, according to its purport, then it must have been good with the Bremen line, for there were no steamers running from this port to Bremen, except those belonging to that line. If there was any value in the paper, the passenger was entitled to a passage by that line. The prisoner sought to establish his defence by proving that this paper would have procured such a passage. He does not attempt to show that he was an agent for any line of

steamers to Bremen, or anywhere else. The paper purported to entitle Heine to a passage, absolutely. True, it is added, below, that something is to be exchanged; but it was for the jury to pronounce whether this paper was put forth with a guilty knowledge, or authority, on the part of the prisoner, and with intent to defraud Heine. The previous evidence of this witness, on this point, was far less conclusive to show the intent of the prisoner, than the evidence which the question put by the court called for. No one can doubt that, if the answer to this question had been favorable to the prisoner, it would have gone far to acquit him on the question of intent, had the jury considered his evidence as satisfactory as that of the principal agent of the line, who had previously testified differently on the same subject.

The inquiry put by the court was to the same effect with that previously put by the prisoner's counsel. It tended to show the intent of the prisoner, if it should be considered by the jury that he and Gilbert were acting in concert; and also to prove the value or falsity of the paper, alleged to have been falsely issued as a ticket for a passage to Bremen. We think the inquiry was proper in this particular connection.

The court charged the jury that it was not necessary in this case, in making out false pretences, that words alone should be used—the pretences may be gathered from the acts as well as the words; and, to this proposition, the counsel for the prisoner took his twelfth exception. The objection urged is, that the indictment has no allegation of any particular acts, independent of representations. Neither specific acts or words are set forth in the indictment. Such allegations, if made, would be pleading the evidence of the fact. The facts are charged which show false pretences and representations, not the evidence of the facts, and such is the proper way to make the allegations.

In the case before the court, Heine asked, in substance, for a ticket for a passage by steamer to Bremen, and the paper in question was furnished to him. Nothing was said by Gilbert, or by the prisoner, indicating whether it was or not such a

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ticket, until after the money was paid. The paper in question was delivered to Heine, as the very article called for. No one said anything about the character of it. It was not necessary to defend it, or declare its character, until it was assailed or disputed. The part of an honest dealer was well acted, and, from the acts and facts of the case, the jury believed that the prisoner was "art and part" in the transaction. A falsehood can be acted as effectively, in many instances, as it can be spoken. This appears to be such a case, and this exception was not well taken.

The same argument applies to, and is a full answer to the fourteenth exception, which was made by the prisoner's counsel, on the refusal of the court to charge as requested, that the acts of the defendant, not being alleged in the indictment, could not be taken into consideration by the jury, and that the prosecution, having declared upon the paper, and not having set forth the acts, must be confined to the paper alone.

The thirteenth exception also arose upon the refusal of the court to charge the jury in conformity to the request of the prisoner's counsel.

The request was, that the court would direct the jury that there was a variance between the proof and the charge, as contained in the indictment; and that, in consequence of such variance, the defendant was entitled to an acquittal.

The argument urged for the prisoner is, that he has not been proven to be an actor in, or an abettor of, the offence of which he has been found guilty; that he did not understand German; that he did not know the contents of the certificate; that the paper itself gives notice that it must be exchanged; and that words or acts, which might be construed to pretend or represent that it was a ticket for Bremen, must not be so understood, because they are at variance with the import of the paper, and every person is required to exercise ordinary diligence and observation, and if Heine was deceived, it was the result of his own folly.

It has been already shown, in considering the first and

second exceptions, that there was sufficient evidence to require the court to submit to the jury the inquiry whether the prisoner and Gilbert were acting in concert. There was also a strong probability that Fowler had directed, or procured Gilbert to do and say what was, in fact, said and done during that transaction.

In the case of the *People* agt. *Adams*, (1 *Com.* 178), the defendant was held liable for obtaining money by false pretences, from merchants in this city, through the medium of an innocent agent, on a false receipt, stating that certain produce was in the defendant's possession, to be forwarded to the said merchants, although the defendant had never been in the state of New York.

That was a case in which the court considered the false pretences and representations alleged to be established by the acts of the defendant alone, where he was not even present when the fraud was consummated.

If the prisoner concerted with Gilbert a scheme to defraud any applicant for passage, which was put in execution in the manner complained of, or procured Gilbert to do it, then the offence charged is substantially proved.

It is not necessary, in an indictment for obtaining money on false pretences, to prove all the false pretences or representations alleged in the indictment.

If any material portion of them is proved, it is sufficient. (*Hill's case, Russ. & Ry.*, 190; 1 *Greenleaf's Ev.*, § 65.)

The material fact in this case was, the pretence or representation that the paper in question was a ticket for passage by steamer to Bremen. Some of the witnesses gave their opinion that the paper was a certificate or receipt, and not a ticket for passage.

The purport of the paper is a contract. It distinctly states that this (the paper) entitles the bearer to a passage this present voyage, &c.

It purports to be signed by the prisoner.

It is addressed also to the prisoner, and underneath is written, "Is to be exchanged," &c.

Union Bank agt. Mott.

What is to be exchanged? Who is to make the exchange? When is the exchange to be made?—Even a diligent or observing person might be excused if he failed to perceive this memorandum at the bottom, after he had read the body of the paper, which expressly engages that he is entitled to the passage for which he had applied. There was nothing to call the attention of Heine to the memorandum. It does not purport to form any part of the contract, and is too indefinite to be the ground of a charge of folly against the deluded applicant for a passage, or as a defence for the artful instigator of the fraud and deceit.

The request of Gilbert to Heine, after he had paid his money, and was about leaving the office, to come the next day to be conducted to the steamer, does not help the prisoner's case. Heine did call the next day, and there was no evidence of any preparation to take him to any steamer, and no one suggested that the steamer had left, or that he had come too late.

The refusal of the court to charge as requested was fully warranted, and the exception last mentioned, like the former ones, was not well taken.

The judgment of the court of oyer and terminer must be affirmed.

SUPREME COURT.

THE UNION BANK agt. GARRITT S. MOTT and others.

Referees have no power to allow *amendments* to pleadings, under § 173 of the Code. Their power of amendment is confined to immaterial variances arising on the trial, under §§ 169 and 170 of the Code.

New-York Special Term, March, 1860.

MOTION to set aside order of referee allowing amendment to complaint.

SAMUEL A. FOOT, *for plaintiff.*
D. DUDLEY FIELD, *for defendants.*

ALLEN, Justice. By § 272 of the Code of Procedure, referees have the same power to allow amendments to any pleadings, as the court upon such trial. Mistakes in pleading and amendments are regulated and provided for in Chapter 6 of the 2d Part of the Code. Sections 169 to 173, inclusive, are more particularly applicable here. Section 169 declares that no variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defence upon the merits, and governs referees as well as courts whenever questions of variance arise.

Section 170 authorizes the court, when the variance is not material, to direct the fact to be found according to the evidence, or to order an immediate amendment without costs.

This is the only provision I find in the Code authorizing an amendment of the pleadings by the court upon the trial, and this is to remedy an immaterial variance; and my opinion is, that the discretion and power of the referee, in regard to amendments, are restricted to cases within this provision, and that it was not the intent of the legislature to confer upon referees power to do what the court may do upon or after judgment, in furtherance of justice, under § 173.

The issues of fact already joined are sent to referees for trial, and *non-constat* that the parties would have consented, or the the court have ordered a reference of other and different issues; and hence, while it was proper and convenient that immaterial variances, which the referee was bound to disregard, should be obviated by immediate amendment, there was no necessity of giving to the referee all power and discretion over the pleadings in the action.

He should have every facility for trying, upon the merits, the issues substantially joined by the parties.

By § 272, therefore, the power of the referee is defined and

limited by reference to the power of the court in like cases upon the trial, and that power is conferred by § 170.

This was not the case of a variance between the pleadings and proof, but, as was properly decided by the referee, the case of an entire omission of the principal cause of action, the plaintiff's claim, consisting of two distinct causes, or demands, the one originating in dealings of the defendants with the plaintiff, and the other in similar dealings of the defendants with a third party, to whose rights and claims the plaintiff had succeeded.

Under the complaint the plaintiff was not entitled to recover for the latter claim, as the referee correctly decided, and an amendment was necessary by adding a second count, and this was allowed by the referee.

This order was not warranted by the Code, and must be set aside, and the referee restricted to the trial of the issues referred.

If it be conceded that the referee may exercise the powers conferred upon the court by § 173, still the order for this amendment is not warranted by it, so far as applicable to this case. That section permits the court, "before or after judgment, in furtherance of justice, and on such terms as may be proper to amend any pleading," by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

The allegations proposed to be inserted in the complaint were not "material to the case," that is, as to the case made, or attempted to be made, by the original complaint, but were necessary to make a new and distinct case. The amendment was not, therefore, within that clause of the section, and was forbidden under the other, as it is confessedly within the ruling of the referee, and clearly upon every principle did change, substantially, the claim of the plaintiff.

It was not a case for conforming the pleading to the facts proved.

Amendments upon trials should be cautiously made, and

care should be taken that the interests of the other parties are not jeopardized by them; and I do not think an amendment of this character, without terms or conditions, was discreet, if the power to authorize it be conceded; but, as the exercise of a discretion vested in the referee, it would not be the subject of review except it were grossly abused, and this could not be predicated of any act of the learned referee here, and I rest my decision solely on the ground of a want of power in the referee.

I presume this is a very proper case for the court to interfere and allow the amendment asked, upon such terms and conditions as shall seem to be proper,—and what those terms and conditions shall be, can only be determined after a case shall be made, requiring or justifying an amendment, and the parties shall be heard.

The order must be set aside without costs, and the plaintiff must have leave to apply, by motion, to this court to amend the complaint, and the proceedings on the reference may be stayed, to allow the motion to be heard.

NEW-YORK COMMON PLEAS.

SORLEY, SMITH and others agt. BREWER & CALDWELL.

An action pending between the same parties in another court, not identical with the present, although relating to the same subject matter in part, but upon different facts and circumstances, and not involving only the same question, is no ground for *staying proceedings* in the present action until the determination of the action in that court, especially where the present action was commenced first.

New-York Special Term, February, 1860.

MOTION by defendants to stay the plaintiffs' proceedings in this action, until the determination of an action pending in the superior court between the same parties.

Sorley agt. Brewer.

LAROCQUE & BARLOW, *for motion.*MARTIN & SMITHS, *opposed.*

BRADY, Judge. This action was commenced, and an injunction against the defendants, Brewer & Caldwell, was granted, and an order for the appointment of a receiver made, prior to the commencement of an action in the superior court, against the said defendants, by David and Albert Sturtevant. This action is predicated of the averments that the plaintiffs have a lien upon the freight money earned, and the liens upon and charges against the cargo of the bark Convoy, carried from Galveston to New-York at the time stated, and which lien is prior to any claim of the said defendants even as charterers; and that the defendants are, nevertheless, collecting such freight, liens and charges, to the prejudice of the plaintiffs. The action in the superior court is upon the charter party alleged to have been made by the defendants, Brewer & Caldwell, with James L. Ferris, and by the latter assigned to David and Albert Sturtevant. The Sturtevants were not made parties to this action when commenced, nor was Ferris; and such was the fact in reference to the action in the superior court, the defendants, Brewer & Caldwell, alone having been made defendants when that action was commenced. Subsequently, and on the 26th of September, 1859, the plaintiffs in this case were, by order of the court, made parties defendants to the action in the superior court, (*see 17 Howard, 571*), and, on the 27th of September, 1859, the Messrs. Ferris and the Messrs. Sturtevant were made parties herein.

In this action the plaintiffs demand judgment against the defendants, Brewer & Caldwell, for the sum of \$1,000, collected by them, and for \$478.71, for moneys due by them for freight as consignees, and pray that all the defendants may be enjoined from interfering with the freight moneys, charges and liens upon the homeward cargo of the Convoy, and that a receiver should be appointed.

In the action commenced in the superior court by the Sturtevants, the demand for judgment is for the price agreed to be

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paid by the charter party, and for damages for detention, and for failures to perform the covenants of the charter party. The actions are, therefore, different, although they relate to the same subject matter in part, but upon different facts and circumstances; the plaintiffs' right herein depending upon their alleged lien acquired by the advances stated, and the assignment by the master averred. In regard to that lien, Judge HILTON having already decided to continue the injunction, and to appoint a receiver, (*see* 18 *Howard*, 276), nothing is necessary to be said here, except that the action must proceed. The action in the superior court, however, embraces distinct causes of action; and, as to those resting in damages for detention, and a failure to perform the covenants in the charter party alleged, it might proceed with propriety against the defendants, Brewer & Caldwell; but, whether that be so or not in this action, all the persons who appear to have any interest in the controversy are now parties; and as this action was commenced prior to the other, and an order for the appointment of a receiver made herein, this court has acquired jurisdiction over the subject matter, which must be retained if the plaintiffs insist.

Under § 122 of the Code, this court could have directed the addition of the Sturtevents and the Messrs. Ferris as parties defendants, if considered necessary to a final determination of the defendants' rights, and could have done so upon the application of those gentlemen. If the action in the superior court were identical with this, or involved only the same question, this court might consider whether, as a matter of discretion, and of substantial justice to the defendants, and not as matter of right, the plaintiffs' proceedings herein should be stayed; but, such not being the fact, and there appearing no reason why such an order should be made, the motion must be denied.

Saltus agt. Pruyn.

SUPREME COURT.

THEODORE SALTUS and FRANCIS H. SALTUS agt. LANSING
PRUYN and others.

No trustee can, directly or indirectly, become the purchaser of the subject of his trust.

Where, on a motion to *reform a deed* of real and personal property, and to settle the question as to whether the conveyance was made subject to the payment, by the purchasers, of an incumbrance of \$41,000, in addition to the consideration of \$50,000 expressed in the conveyance, or whether their title was to be free and clear of all incumbrances, on payment of such consideration,

Held, it appearing that the conveyance was made between parties who were *executors*, and in relation to the property of the *testator*, (which was, in fact, corporate stock), that the deed was void as against all the parties in interest who did not consent, or who, being under age, were incompetent to consent. Therefore, a *reference* was ordered, to inquire into the true value of the property at the time of the consummation of the sale, and reserving all further directions, as to whether the deed should be modified, annulled, or affirmed, until the coming in of the referee's report.

New-York Special Term, January, 1859.

MOTION by plaintiffs to reform a deed of real and personal estate.

FIELD & SLUYTER, *for motion.*

E. A. DOOLITTLE, *opposed.*

ROOSEVELT, Justice. The plaintiffs are two of the sons of the late Francis Saltus. One of them is also an executor of his will. After their father's death, they became purchasers of all the property of the Peru Iron Company, of which their father, in his lifetime, with the exception of a few shares, was the sole stockholder. The purchase included the lands adjacent to the works—some standing in the corporate name, and some in that of the testator—all situated in the counties of Essex and Clinton. But the conveyance was made solely in the name of the executors.

Soon after the supposed completion of the transaction, a dis-

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pute arose as to the terms of sale; the purchasers alleging that the price was to be \$50,000 "free and clear," as they express it; and the son-in-law and daughter-in-law of the testator, representing two-eighths of the estate, insisting that the purchasers were to assume, in addition, a debt of the Iron Company, which is set down at \$41,737.

All the other representatives of the testator concur with the plaintiffs. The deed, however, as drawn, would seem to correspond, in its legal effect, with the views of the defendants.

Under these circumstances, the difference, as will readily be seen, being a very substantial one, the plaintiffs file their bill to reform the conveyance.

The cause was tried without a jury. Both the plaintiffs and their mother were examined as witnesses on one side, and the defendant, Mr. Pruyn, and the counsel of Mrs. Vence, on the other. Their statements, on the direct point in issue, are contradictory, and indicative, at least, of a very remarkable misapprehension of each others' views. All that the court, in such a case, can do is to weigh probabilities, and approximate to the truth. Absolute certainty is unattainable.

It may be observed, in the first place, that the arrangement was not a hasty one. Its inception was in April or May, 1854, its consummation in April or May, 1856. And during the long interval of two years, it was the subject of numerous conversations. The original proposal, whether made to or by Mr. Pruyn, was \$50,000, and that continued to be the sum, without variation, to the end—and Mr. Pruyn is sworn to have said, although he has "no recollection" himself of such a statement, that it would "swamp" the purchasers at that.

Notwithstanding this ample interval taken for deliberation, no progress seems to have been made towards correcting the very vague and confused notions which were entertained by the parties, and on which they negotiated and acted, as to the title and true position of the property proposed to be sold.

The Peru Iron Company was not a partnership, but a corporate body; and, although Mr. Saltus owned more than ninety per cent. of the shares, he was not the legal owner of

the corporate property, nor the legal debtor for the corporate liabilities. As to that property, he was a stockholder, and nothing more. This interest, in the eye of the law, was personal, and not real; and his executors, as executors merely, and without any special power in the will, were authorized to sell it, not as so many acres of land, but as so many shares of stock. As stock, it was subject by the general law to all the debts of the corporation—as land, it was subject only to specific mortgages and judgments. Speaking, therefore, of such property, the terms “free and clear” would have two different senses. One party to the negotiation might well mean exemption from all the debts, while the other might well suppose he only referred to mortgage and judgment debts. Now, as there were mortgages in the present instance, and mortgages to a very large amount on the lands, and held, too, by the testator, Mr. Pruyn might have supposed that the expression “free and clear,” if used, was intended to apply to them. And as it would seem to have been his understanding from the outset, that the mortgages should be assigned to the purchaser, it is easy to conceive that the conversations, in that particular, made no impression on his memory. On the other hand, the intended purchasers, being familiar with the property, and knowing that, as stock, it was liable to a floating debt of more than \$40,000, naturally wished an exemption from such a charge. The idea must have been, and no doubt was, strongly impressed on their minds; and having repeated it, as they supposed, in every conversation, of which there were so many, they concluded, we may readily believe, that it was well understood by their brother-in-law. When the agreement, therefore, was concluded, or was supposed to be, it is quite clear that there was an essential misunderstanding. The minds of the parties never met.

And this conclusion is confirmed by many other circumstances.

First, The deed itself states the consideration to be \$50,000, and makes no allusion whatever to the \$41,000 additional. *Second*, Instead of an assignment of stock, and by parties de-

scribing themselves merely as executors, the vendors "grant, bargain, sell, alien, release, convey and confirm"—terms applicable ordinarily to real estate—"by virtue of the power and authority to them in and by the said last will and testament," all those certain "lots of land," &c. It is true, they add, after describing the real estate, all the testator's interest in "the corporation," and in all "stock, bonds, mortgages," &c.; but this does not materially weaken the argument, for they knew, one of them being president, that the stock, as such, by the terms of the charter, could only be transferred by an entry on the books of the corporation. (*See Laws of 1824*). *Third*, So loose is the description in the deed, that it actually covers, in terms, and perhaps in legal effect, not only the property already mentioned, but "*all other property* of every kind and nature whatsoever, belonging to said Francis Saltus at the time of his death," indicating, it may be, a necessity for "re-forming" the instrument as much in the interest of the defendants as of the plaintiffs. *Fourth*, The deed contains not only a long covenant for the quiet enjoyment of "the hereditaments and premises thereby granted and conveyed, or intended to be," as against the grantors, and all persons claiming under them, but an indemnification also against "all other charges or incumbrances whatsoever, had, made, committed, executed, or done by them, the parties of the first part, or by, through, or with their acts, deeds, means, consent, procurement, or privity." Now, it appears that the very notes in question, constituting the contested \$41,000, were "charges or incumbrances," if they be a lien at all, contracted with the consent and procurement of the executors, including Mr. Pruyn. "We agreed," says Mr. Pruyn, "to continue the business, during the current year, (1854), for the benefit of the estate." And it was accordingly continued till the 1st January, 1855—a period of more than eight months; and in that period all the liabilities in question were incurred. They come, therefore, as it seems to me, within the letter of the covenant of indemnity; and if that view be correct, the deed needs no reform. *Fifth*, The understanding of the parties is

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still further shown by the fact that, on the 3d of June, 1856, before the acknowledgments of the deed were fully completed, and while the transaction was, in some sense, still *in fieri*, one of the purchasers, as executor, filed his account in the surrogate's office, on the return of the summons to the other next of kin, and in it distinctly made the following charge: "Notes of the Peru Iron Co., 1 Jan., 1855, for the payment of which the estate was bound—\$41,737.01." It should be observed, too, that Mr. Pruyn's signature, as an executor, accompanies those of Theodore Saltus (one of the plaintiffs) and Mrs. Saltus, the other executor, at the foot of the petition on which the accounting was had, and that that petition bears date the 9th of April, 1856, only one day before the date of the letter from Mr. Pruyn, in which he declines, as yet, to sign the deed, alleging, as a reason, that Mr. Theodore Saltus, one of the intended purchasers, had not given him "any information as to the terms and conditions of sale." Surely, the payment or not of an additional \$41,000 was an important *condition*; and how, then, could Theodore Saltus, if he had not given him "any information," have previously told him that the payment of an incumbrance to that amount, in addition to the \$50,000, was one of the terms of the purchase? There is, at least, a seeming contradiction here, calling for explanation.

Sixth, Although the position assumed by the plaintiffs was distinctly stated in the proceedings before the surrogate, and involved a difference, if any, of more than \$41,000, yet the whole attention of the contestants, Mr. Pruyn and Mrs. Vence, seems to have been engrossed by two other sales, involving, together, a difference of less than one-fourth that amount.

Seventh, The position assumed by the defendants involves this absurdity, that, although the indebtedness of the corporation was constantly fluctuating, the purchasers were to pay the fixed sum of \$50,000, subject to that indebtedness—which might be ten thousand, or twenty thousand, or thirty thousand, or even fifty thousand dollars; in other words, that, in a serious bargain between business men, it was a matter of indifference to the purchasers whether they paid \$50,000 or

\$100,000 for the same identical thing. *Eighth.* The intrinsic value of the property, free and clear, according to the weight of the evidence, did not exceed \$50,000, and its market or saleable value, leaving the offer of the plaintiffs out of view, instead of being double, did not, in all probability, reach half that sum.

It has been urged, in corroboration of Mr. Pruyn's view of the case, that when Mrs. Vence refused to give her sanction to the proposed sale, a larger sum than one-eighth of \$50,000 was paid her, with a guaranty in addition against all debts. This objection, however, may well be answered by the allegation that it was a mere fractional concession to buy off a very serious difficulty. And the instrument, too, it may be observed, although drawn by a thoroughly qualified professional hand, wholly omits any recital of the alleged assumption of the \$41,000 incumbrance, and merely indemnifies Mrs. Vence against any loss or damage "which may occur to *her* by reason of *her* being obliged to pay any debts, claims, or demands due by the said Peru Iron Company." It was a guaranty to hold "*her, the said Euphemia Vence*, harmless (and not the executors,) from the payment of any such debts," &c.; and was founded, no doubt, upon the idea, somewhat vaguely entertained, that stockholders in such corporations, in the event of deficiency, may be held liable personally to respond to the creditors. If more than this was intended, how does it happen that the draftsman of the instrument, who was also counsel both for Mrs. Vence and Mr. Pruyn in the proceedings before the surrogate, did not, in his testimony on that occasion, rebut the implied assertion to the contrary, made by Mr. Theodore Saltus in the charge of the \$41,000, as already quoted?

A suggestion, however, has been made on the part of Mrs. Vence, which it is not easy to meet. If the purchasers, it is said, were to pay for the whole property \$50,000 and no more, in other words, \$9,000 over and above the debts, can it be conceived that they would have been willing, even as a peace offering, to pay within a thousand dollars of that amount for one-eighth? On the other hand, however, it may be asked,

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if Mrs. Vence, under the arrangement as it stood, was to receive, in some way, as her share, between \$11,000 and \$12,000, being one-eighth of \$91,000, why should she, or her attentive counsel for her, haggle, as it may be called, to get \$8,000? The only reliable answer to both questions would seem to be, that the most unaccountable confusion of ideas prevailed on both sides, resulting, in a great degree, from the confused character, as we have seen, of the subject of the negotiations.

Should there, however, be sufficient ground, on the evidence, for reforming the deed in controversy, and making it more definite and certain, such a course, it is said, is precluded by the decree of the surrogate, adjudging that the item in question, "being the amount of the notes outstanding of the Peru Iron Company, be stricken from the account rendered by the executors."

The surrogate, it is true, on the evidence before him, declared that, "being a debt of the Peru Iron Company, the notes were to be paid by that company, and were not a proper charge against the parties selling their interest in that company." This adjudication, however, resulted from his interpretation of the legal effect of the deed as it stood—an opinion, the correctness of which is to be determined on the appeal now pending in the general term of this court. Assuming its correctness—as for the present, perhaps, we must do—it furnishes an additional reason for the direct action of the only tribunal which has jurisdiction to correct the instrument. The surrogate, it is conceded, had no such power.

Outside, and independently of the alleged errors in the deed, there is a point to be considered which has been scarcely adverted to by counsel. The deed was void as against all parties in interest who did not consent, or who, being under age, were incompetent to consent. No trustee can, directly or indirectly, become the purchaser of the subject of his trust. The court, therefore, in behalf of the infants, is bound to direct a reference to inquire into the true value of the property at the time of the consummation of the sale, before making any decree to reform the deed, or to give it effect even in its present

shape. Some evidence on that point was taken, as before stated, at the hearing in open court, but only in an incidental manner. It is the right of the infants that the question of value should be put in the form of a direct issue, and a report made thereon.

Mr. Pruyn, I observe, in one of his letters to Mr. Theodore Saltus or his counsel, objected to private bargains, and suggested that the only proper mode to determine values in such cases was a well advertised sale at auction. "This (says he, and very justly,) is the fairest way, and takes away all liability." It is to be regretted, for the peace of the family, that this advice had not been followed. An order, easily obtained, discharging, to that extent, Mr. Theodore Saltus from his duty as trustee, would have enabled him legally to have become a bidder on his own behalf, at the sale; and, by fixing the terms and conditions with clearness and precision, would, in all probability, have prevented the unfortunate misunderstanding and litigation which have ensued from the opposite course.

An order of reference must be entered, to inquire into the value of the property, as above suggested, and to reserve all further directions, as to whether the deed shall be modified, annulled, or affirmed, until the coming in of the referee's report.

NEW-YORK SUPERIOR COURT.

GEO. PEGRAM agt. JOSEPH CARSON and HAZELTINE VICKERY.

A statement in a petition for a *discovery of books and papers*, which, in all its material allegations, is capable of being condensed into a sentence like this: We believe your books and letters will help our defence, and if they do, it is material for us that you should show them; is too vague and indefinite to grant an order of discovery upon. (*The authorities on this question examined, and the principles deducible therefrom stated*)

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New-York, General Term, January, 1860.

Present, BOSWORTH, Ch. J., HOFFMAN, WOODRUFF, PIERRE-PONT, MONCRIEF, and ROBERTSON, JJ.

APPEAL from an order denying a discovery of books and papers.

By the court—**HOFFMAN, J.** The action is to recover a quantity of corn, which it is alleged was the property of the plaintiff, and to the possession of which he was entitled. That about the 1st of August, 1857, the defendants wrongfully possessed themselves of a part thereof, and, on the 25th of August, of the remainder. A demand and refusal is stated. The answer set up an ownership in the firm of Starling, McCulloch & Co., and a right to hold the corn under them.

The petition states that the plaintiff resides in St. Louis, Missouri, and has in his possession, or under his control, books of account kept by him in the year 1857, and prior to the 26th of August, containing entries of his accounts and transactions with the firm of *Starling, McCulloch & Company*, and also entries in relation to the corn in question.

Also letters written to him by said Starling, McCulloch & Company, or one of the members of that firm, during the same year, and prior to the said 26th of August.

Also copies of letters written and sent by the plaintiff to the said Starling, McCulloch & Company, or one or other of the members of that firm, in the said year, and prior to the said 26th of August.

Also copies of telegraphic communications, which passed between him and said Starling, McCulloch & Company, or one or other of the members of that firm, in the said year, and prior to the said 26th day of August.

The petition then states that the petitioners are advised by their counsel, and verily believe, that a discovery of all the aforesaid entries in all books of account of the plaintiff, and of all the letters, and copies of letters, and telegraphic communications above mentioned, is material and necessary to enable them to prepare for the trial of this action; that, by such dis-

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covery, they verily believe it will appear that Starling, McCulloch & Company were the owners of, or interested in, the corn in controversy, either jointly with the said plaintiff or otherwise, and were largely in advance to the said plaintiff on account of the same, and had a right to pledge the same to the said defendants, as they did pledge the same.

The statements of the petition, therefore, amount to this: The defendants believe the plaintiff has books, letters, or copies of letters, and telegraphic communications in his possession or control, which will, as the defendants believe, show some title in Starling, McCulloch & Company to the corn in question, and which they are advised by counsel are material and necessary for their defence on the trial. The substance is this, and nothing more: We believe your books and letters will help our defence, and, if they do, it is material for us that you should show them.

There is no allegation of knowledge, or of information from any one, as to the contents of one entry, or of one letter, or communication being pertinent to the question in issue. It is difficult to imagine any statement more vague and indefinite than this.

In *Hoyt agt. The American Exchange Bank*, (1 Duer, 602; S. C., 8 How. 89), a leading case in our own court, the discovery was directed to entries connected with the post note, and Indiana bonds, the subject of controversy in the action. In *Terry agt. Nubel* (12 *Legal Observer*, 146,) I had occasion to examine the original petition in *Hoyt agt. The American Exchange Bank*; which is not stated in the report. The prayer was, that the defendants might give sworn copies of all entries in any books, &c., in reference to, or showing where, under what circumstances, for what purpose, or consideration, and by and from what person or persons, the post notes of the Morris Canal and Banking Company, and the seventy-three bonds of the state of Indiana, mentioned in the petition, were severally transferred or came into the possession of the defendants. The petition set forth that the defendants had books containing evidence relating to the merits of the cause, and to the facts aforesaid, a

schedule of which books were thereto annexed; that the same would prove the allegations of the complaint. The order was nearly in the language of the prayer. Upon an application for a more full and perfect discovery, upon an allegation of the insufficiency of what had been given, an order was made at special term, giving power to a referee to call for and examine all books, papers and documents in the defendant's possession or control, containing entries in reference to the discovery ordered by the previous order. This order was as unlimited, indefinite and sweeping as that we are asked to make in the present instance. Except as to the matter of reference, it would serve as a precedent for this case. Upon appeal to the general term it was discharged, and the course pointed out for the dissatisfied applicant to move for a further discovery in definite particulars, which the return or other papers may induce the court to believe the party has in his possession, and which relate to the matters as to which a discovery has been ordered, and whose existence was shown to be probable.

The view of the subject taken by Mr. Justice HARRIS, in *The Commercial Bank of Albany agt. Dunham* (13 How. Pr. R. 561,) is applicable to this case. "The plaintiffs specify no entry, or book even, which they propose to use as evidence upon the trial. They ask for license to search, at their own pleasure, all the books in which all the transactions of the defendants have been recorded for a period of eight years, in the expectation that, somewhere within the wide range, they may find some evidence that will aid them in sustaining the issue upon the trial."

Justice INGRAHAM, in *The People agt. The Rector, &c., of Trinity Church*, (6 Abbott, 177), has expressed himself with equal decision against the right of a party to a discovery, upon allegations in a petition not more vague and indefinite than those in the present case.

In *Davis agt. Dunham* (13 Howard, 425,) the court, at general term, in the third district, held that the facts and circumstances must be stated sufficient to satisfy the court, or officer to whom the application is made, that there is reason to

believe that the books, &c., which the party seeks to examine, do, in fact, contain material evidence.

The case of *Gould agt. McCarty* (1 Kernan, 575,) must be adverted to. The petition was nearly as indefinite and sweeping as that in the present instance. In addition to the comments of Mr. Justice INGRAHAM (*The People agt. The Rector, &c., ut supra,*) upon the case, it should be noticed, that the defendant submitted, to some extent, that the order should be made by admitting possession of "a private book, in which he made short entries of the purchase and sales of stock, or contracts therefor, and his ordinary check-book kept in the usual manner." An order, at special term of this court, directed an unlimited delivery of sworn copies of all entries, and papers containing entries, relating to the merits of the action. But, on appeal, the general term limited the discovery to the entries and memoranda in his check-book, or private memorandum-book, mentioned in his affidavit read in opposition. A subsequent judgment, had on disobedience of this order, was carried, by appeal, to the court of appeals, and the order there examined, and judgment affirmed. The points decided by the court of appeals were, that the Revised Statutes, as to discovery of books and papers, were yet in force, and not superseded by the Code, and that the superior court had the same authority as the supreme court under them.

There is another point equally decisive against the defendants, and to support the order appealed from. There is not, in the petition, a statement to show that the defendant does not possess the means of proving, by other competent evidence, the title or interest of the firm of Starling, McCulloch & Company, which will enable him to sustain his case. The opposing affidavit shows that one of the firm can be readily reached as a witness.

We consider some allegation of this nature to be indispensable.

In *Stalker agt. Gaunt* (12 *Legal Observer*, 132,) the subject was much considered. It was observed, in the next place, discovery was the mere instrument for obtaining evidence to

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make a legal right available, without pronouncing a decision on that right. (*Hare on Discovery*, p. 110.) Hence it was essential that a bill for that purpose should state that it was in aid of some judicial proceeding. (*Attorney General agt. Rose*, 8 Price, 205; *Conderte agt. Watkins*, 5 Mud. 18.) "The Revised Statutes do not change this principle. There must be a suit pending in the supreme (or other) court when the petition is presented. The change, by permitting an application to the common-law court itself, instead of resorting to another tribunal, is but matter of convenient practice.

"Now, the foundation of such a bill was the inability of the party to establish his case without the discovery. It is said, generally, that it lies because he cannot otherwise prove the facts, or in aid of proof. The meaning of the last clause, I take to be, that the aid is necessary in order to establish one or more facts in a series of facts which the party must prove, or to supply a partial defect in the testimony as to one or more of such facts, or as to the single fact on which the right depends. Whether the suit was in the court of chancery, or in another court, was immaterial as to the rules which governed discovery."

I have carefully examined the following authorities: *Seymour agt. Seymour*, 4 John. Ch. Rep. 410; *Gelston agt. Hoyt*, 1 John. Ch. Rep. 543; *Leggett agt. Postley*, 2 Paige, 599; *Newkirk agt. Willis*, 2 Ch. Cas. 296; *March agt. Davidson*, 9 Paige, 580; *Bass agt. Bass*, 4 Hen. & Mumf. 475; *Lowe agt. Stebbins*, 9 Paige, 624; *Vance agt. Andrews*, 2 Barb. Ch. Rep. 370; *Duval agt. Ross*, 2 Mumf. 290; *Norwalk Railroad Co. agt. Story*, 17 Conn. Rep. 213. While there are to be found some modifications of the rule, yet I apprehend that the rule stated in the explicit language of the chancellor, remains to this day substantially the doctrine upon the subject. "If a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. It is not denied, in this case, that every fact material to the defence at law, can be proved by the ordinary means at law, without resorting to the aid of this court. I should presume, from the bill, that

every material fact respecting the ownership of the vessel could be established without coming to this court; and such trials are not to be delayed, and discoveries required, when the necessity of such delay and discovery is not made to appear." (*Gelston* agt. *Hoyt*, 1 *John. Ch. R.* 546.)

The power, under the Code, to examine parties as witnesses was then adverted to, and it was concluded:

"Two important principles appear to me deducible from this examination of the subject. If the discovery is attainable by competent and available testimony, other than that of the party, a production of books and papers should not be allowed, except under special circumstances. If it is attainable by the examination of a party as a witness, it should be also refused, except upon some special ground."

The results in this case are fully approved of, and acted upon, by Mr. Justice HARRIS, in *The Commercial Bank* agt. *Dunham*, before cited.

And, in *McAllister* agt. *Pond*, (15 *How.* 299; 6 *Duer*, 702), Mr. Justice WOODRUFF says, "One of the first facts which should appear, on an application for the discovery of books or papers for the purpose of preparing for trial, is, that the applicant has not in his possession the same information, or, if he has, that he has not the means of establishing, by other available proof, the contents of such books and papers."

Again: "It is not stated that the plaintiff cannot prove, without the production sought, every fact which is material to his case."

We consider the present application to be entirely against settled rules, and that the order below ought to be affirmed; nor is there anything in the case to justify our giving the party an opportunity to renew it.

UNITED STATES CIRCUIT COURT.

CARLOS BUTTERFIELD agt. JOHN J. BOYD and others.

Where a ship had been towed to sea, and had passed the bar outside of Sandy Hook, and was in the act of taking in her hawser, with only her maintop stay sail set, and at this time a *Mexican steamer*, with her steam up and sails set, hove to within a quarter or half a mile of the ship, for the purpose of sending back to New-York, by the tug which towed the ship, a pilot and some passengers, and, within some ten or fifteen minutes thereafter, the vessels drifted together causing a collision ;

Held, that upon the weight of testimony the steamer was in fault, and could not sustain the libel: she had her steam up and sails set, and it did not appear that any effort was made, by the use of either, to avoid the collision. The steamer took the risk of the collision and damage by heaving to so near the ship, with a flood tide tending to set in that direction—the ship being unable to set sail until her hawser was taken in.

New-York, September, 1859.

APPEAL from a decree of the court below dismissing libel.

MR. CUTTING, and BEEBE, DEAN & DONOHUE, *for libellant and appellant.*

MR. MORTON, and FULLERTON & DUNNING, *for respondents.*

NELSON, C. J. The libel was filed in this case by Butterfield, the owner of the Mexican steamer *Iturbide*, against the respondents, owners of the ship *Mercury*, to recover damages occasioned by a collision occurring between the two vessels on the 4th of November, 1854, after both vessels had passed the bar outside of Sandy Hook. The ship had been towed to sea, and the hands were engaged in taking in the hawser, which had been cast off by the tug a short time before the accident occurred.

The steamer had passed the ship as she was going through the Gedney channel, and soon after hove to for the purpose of sending the pilot and some passengers on board the tug, which was about to return to the city. At the time the hawser was

cast off, the steamer was standing some quarter or half a mile to the windward, and in advance of the ship. The wind was from the W.N.W., a pretty fresh breeze, the tide about half flood, setting in a direction opposite to the wind. The steamer was heading N.E., and the ship about E., or about E. by S. The steamer had come down the bay with steam and canvas, topsails and topgallant sails, jib and flying jib. When she hove to, her jib and flying jib were lowered, her fore and main topsails, fore and main topgallant sails were set, and the head sails were laid back.

The ship had only her maintop staysail set, and was under no other sail. The vessels came together nearly broadside, the starboard side of the steamer against the larboard side of the ship, within some ten or fifteen minutes after the one had hove to and the other had commenced taking in the hawser. They drifted together, and the serious dispute in the case is, which party was in fault in permitting his vessel to drift against the other. Four witnesses, including the master, mate, pilot, and a passenger on board the steamer, have been examined for the libellant, and concur that the ship drifted against the steamer. Five witnesses on board the ship, including the master, first and third mates, the pilot and a hand, were examined, and all concur that the steamer drifted against their vessel.

The court below dismissed the libel, and it is difficult to see, upon this conflict of testimony, how it could have arrived at any other conclusion, unless there is something else in the case charging fault upon the respondents' vessel.

The testimony of the master of the steamer is relied on to establish fault. He states that the helm of the ship was starboarded; and that, with the headway on at the time the hawser was thrown off, from the impetus given by the tug, she came up in the direction of the steamer and caused the collision. This, however, is but conjecture on his part, as he saw no such manœuvre. All the witnesses on board the ship deny this, and concur that as soon as it was seen that the vessels were approaching each other, the helm was put hard a-port and jib put up, or attempted to be put up. The only fault the

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master of the steamer pretends, in his testimony, that was chargeable upon the ship, was in this false movement of star-boarding the helm—thus abundantly disproved—and no other fault is imputed by any of the other witnesses, except the fault of drifting against the steamer. Even if this last had been established, which it is not, the burden would still rest on the libellant to show that the drift of the ship could have been prevented by a proper and skillful management, or that it was occasioned by some positive mismanagement on the part of her master and hands.

It was suggested on the argument, that the maintop staysail was insufficient to give steerageway and govern the direction of the ship, but it is agreed that it would have been improper to have set the sails while the hawser was taking in; and it appears that every preparation was made to set them as soon as this service was finished. It was also suggested, that the hawser should not have been thrown off while the vessel was there near the steamer. But it may be answered, the steamer should not have taken a position so near the ship with a flood-tide tending to set her in that direction. The hawser was thrown off at the usual place.

Besides all this, we feel bound to say that the management of the steamer, in the position in which she lay, was not such as to recommend her to any very favorable consideration. She had her steam up and sails set, and yet it does not appear that any effort was made by the use of either to avoid the collision. It is agreed that the vessels were apart from each other from a quarter to half a mile before they began to drift, and it is difficult to resist the conclusion that, if there had been proper attention to duty under the circumstances, on the part of those on board the steamer, she might have avoided the accident,—at least she should have made the effort.

We are satisfied the decree of the court below is right, and should be affirmed.

NEW-YORK SUPERIOR COURT.

THOMASON agt. DEMOTT.

In order to maintain an action for *malicious prosecution*, it is necessary that the complaint should show that the alleged malicious prosecution has been *legally and finally terminated*.

New-York, Special Term, October, 1859.

DEMURRER to complaint.

BOSWORTH, Ch. Justice. This is a demurrer to plaintiff's complaint, as not stating a cause of action. The complaint alleges that the defendant maliciously, and without probable cause, procured the plaintiff to be indicted for perjury, and to be arrested and imprisoned on that charge; that on the 8th of November, 1858, the assistant district-attorney of the city and county of New-York wrote, and certified on the indictment thus: "On the papers there seems to have been no perjury committed; the cross-examination should be taken with the complaint; and the case is frivolous. It should never be tried. November 6th, 1858," (signed by the assistant district-attorney.) "Whereby," as the complaint avers, "the said prosecution, and all proceedings on the said indictment, were and are completely and finally closed and ended."

To maintain an action like the present, it is essential that the complaint should show that the alleged malicious prosecution has been terminated by the plaintiff's acquittal, or in such way that no further proceedings upon it can be had against him. (*Clark agt. Cleveland, 6 Hill, 344.*)

Even a *nolle prosequi*, entered without the leave of the court, would be a nullity, (2 *R. S.* 728, *sec.* 56,) [*sec.* 54], and the court cannot enter a *nolle prosequi* of its own motion. (*The People agt. McLeod, 25 Wendell, 483-572.*) Nothing has been done to put an end to the indictment found against the plaintiff, except the indorsement upon it, by the assistant district-

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attorney, of his opinion, as above copied. That interposes no obstacle to bringing the plaintiff to trial upon it. The complaint, therefore, is fatally defective, and the defendant must have judgment; but the plaintiff may amend on payment of costs.

SUPREME COURT.

GEORGE G. HASTINGS, Receiver, &c., agt. DAVID THURSTON
and others.

Where the plaintiff, in his complaint, states the circumstances under which a defendant made an assignment for the benefit of creditors, and sets forth the whole assignment, and then alleges that it is fraudulent and void on its face, it is sufficiently *definite and certain*. That is, it is not necessary to allege and state why, and for what reason, the assignment is fraudulent and void on its face. And so the allegation (following the above) in the complaint, that the assignment was made with intent to hinder, delay and defraud creditors, *held sufficiently definite and certain*.

New-York, Special Term, March, 1860.

MOTION by defendants to make allegations in the complaint more definite and certain.

The complaint in this action states that plaintiff has been appointed receiver, under supplementary proceedings, on several judgments recovered against the defendant Johnson, and has accepted the appointment, and is vested with all the rights and powers of such a receiver. That on May 14th, 1859, Johnson was owner and in possession of a large amount of property, real and personal, and then executed to the defendants Thurston and Lefferts, an assignment (set forth at length) of certain real estate, and of all his personal property, in trust for the purposes in said assignment expressed; that Thurston and Lefferts have accepted said assignment, and claim title to all the property therein mentioned, and then proceeds as follows:

"And the plaintiff alleges and submits that the said instrument of assignment is fraudulent and void upon its face, &c. And the plaintiff is informed and believes, and therefore charges, that the said instrument of assignment was made and executed by the said defendant Jeromus J. Johnson, and accepted by the defendants Thurston and Lefferets, with the intent to hinder, delay and defraud the creditors of said Johnson," &c.

On the complaint, the defendants, Thurston and Lefferets, move that the allegations above quoted be made more definite and certain, on the ground that they are so indefinite and uncertain that the precise nature of the charge is not apparent.

BONNEY, Justice. This motion is made under section 160 of the Code. The plaintiff, in his complaint, after showing his right, as the representative of creditors, to question the assignment, has set forth the whole assignment, with the schedules thereto, and then alleges that said assignment is fraudulent and void upon its face. The assignees (defendants) ask an order that this allegation be made more definite and certain, by stating why, or for what reason, said assignment is fraudulent and void. I have examined a great number of authorities to which reference was made on this point, but find no principle or decision which, in my judgment, requires or authorizes me to grant this part of the motion. The pleader must undoubtedly state all material facts, with proper definiteness and certainty. If he omit any material fact, his pleading is demurrable; and if his statement of it (the fact) is not sufficiently definite and certain, he may be required to amend. In this case, the plaintiff has stated the circumstances under which the assignment was made, and set forth the whole assignment in its exact words, and then alleged that it is fraudulent and void on its face. This is merely raising a question of law—the legal conclusion at which the pleader has arrived upon the facts before stated. I do not see how it can be made more definite or certain without requiring him to state the points, arguments and authorities upon which he expects to main-

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tain this allegation, and this surely is not required by the Code.

The other portion of the complaint which defendants ask to have amended, is the charge immediately following the allegation, that the assignment is fraudulent on its face—that it was made with intent to hinder, delay and defraud creditors; and, in my opinion, the observations in relation to the preceding allegation apply with equal force to this charge. With what effect the assignment was made is certainly a question of fact, to be sustained only by proof of other facts, so stated in the complaint as to authorize proof in relation to them. By what amendment this charge of intent can be made more definite or certain, I cannot see. Whether or not the facts, by proof of which the plaintiff expects to substantiate it, are sufficiently stated, is not now before me. The intent itself appears to me to be stated with all the certainty and definiteness of which it is susceptible.

Motion denied, with ten dollars costs.

SUPREME COURT.

JONES agt. UNDERWOOD.

Costs should be taxed according to the fee bill in force at the time of the rendition of the last verdict in the action. (To the same effect is Jackett agt. Judd, ante, p. 385.)

New-York, Special Term, March, 1880.

MOTION for retaxation of costs.

ALLEN, Justice. It is well settled, first, that the statutes in force at the time the right of the party to costs becomes fixed, control the taxation and fix the items to be allowed to the successful party. (*Tucker agt. Hunter*, 15 *Howard*, 156; *Crory agt. Norwood*, 5 *Abb.* 219.) Second, that the right to costs ac-

crues and becomes fixed upon the coming in of the verdict in those actions in which costs of course are given to the prevailing party. (*Burnett agt. Westfall*, 15 *Howard*, 431; *Torry agt. Hadley*, 14 *Id.* 357.)

A party is entitled to have his costs adjusted by the fee bill in force at the time of the verdict. (*Moore agt. Westervelt*, 14 *Howard*, 279.) It would seem to follow, first, that as there can be but one taxation or adjustment of costs to be inserted in the judgment, (*Code*, § 11), the entire bill should be controlled by the same statute, and taxed or adjusted at the same rate; and, second, that the verdict which fixes and determines the right to costs, should be that verdict upon which the judgment, of which the costs are the incident, is founded, and not a verdict which was the result of a mistrial, and did not give to the party a judgment at all.

It would be conceded that, if the first verdict had been set aside for error, or as against evidence, upon the adjustment of the costs, it could not control the final rights of the parties as to costs after a second verdict in the action. But the adjustment of the costs is a mere incident to the entry of the judgment; and, the verdict and judgment being "reversed and held for naught," all the incidents of both fall with them. Had the fee bill been so amended that the compensation of the plaintiff for services upon and anterior to the first trial would have been more than under the fee bill in force at the time of the first verdict and adjustment, it could not have been claimed that the adjustment of the costs under an erroneous verdict would have precluded him from claiming the increased compensation. As he would not have been estopped by that adjustment, the defendant is not.

The clerk was right in disregarding the former adjustment, and re-adjusting the costs *de novo* according to the fee bill in force at the time of the rendition of the last verdict.

If any item has been omitted by the clerk, which would be allowable under the present fee bill, a re-adjustment should be ordered. But I do not understand this to be claimed. The motion is, therefore, denied; but without costs.

Barnes agt. McAllister.

SUPREME COURT.

DEMAS S. BARNES and JOHN D. PARK agt. JAMES McALLISTER.

In an action for the *specific performance* of a contract, to compel the defendant to manufacture and sell to the plaintiffs exclusively, a particular article, an *injunction* which restrains the defendant from selling, or in any manner disposing of such article to any other persons than the plaintiff, &c., will be dissolved, where it appears :

- 1st. That the agreement or contract between the parties is not fair and equal ;
 - 2d. Where it would be impossible for the court to ascertain whether the most essential provisions of the contract on both sides, have been complied with; and,
 - 3d. Where the parties themselves have provided the actual measure of damages to be paid by the defendant in case of a violation of the terms of the contract.
- In such a case, it is proper to leave the parties to their remedy, by an action for damages, in case of a violation of the contract.

New-York, Special Term, March, 1860.

MOTION by defendant to dissolve an injunction, obtained by plaintiff, *ex parte*.

The action is brought by the plaintiffs, the firm of Barnes & Park, who are wholesale druggists and patent medicine dealers at No. 13 Park Row in this city, for a perpetual injunction, restraining the defendant, who is the manufacturer, at No. 143 Fulton street in this city, of an ointment known as "McAllister's All-Healing Ointment, or World's Salve," from selling or in any manner disposing of said ointment to any other persons than the firm of Barnes & Park, and to compel the defendant to manufacture the ointment for them exclusively.

The facts are fully stated in the following opinion.

LEONARD, Justice. The complaint herein demands a specific performance of a contract between these parties, in respect to the manufacture and sale, for the term of twenty-one years, of an ointment known as "McAllister's All-Healing Ointment, or World's Salve," the component parts and manufacture of which is a secret known only to the defendant.

The defendant has agreed to manufacture this salve, for the plaintiffs exclusively, for \$—— per gross, in quantities from 20 to 50 gross, as the plaintiffs require, keeping them always with twenty gross on hand, the quality to be always equal to the standard existing when the contract was made in April, 1856, perfumed, labelled, put in packages, boxed and marked as agreed on, or in any other style which the plaintiffs dictate for the benefit of the article.

The defendant has agreed not to sell, trade or exchange the ointment with any other party; not to divulge the secret or transfer his right thereto, except by the permission of the plaintiffs. The plaintiffs agree to re-sell to the defendant, at the same prices, all that he requires for retail at his store, or to fill European orders. For every gross which the defendant sells in violation of the agreement, he binds himself to pay to the plaintiffs two gross.

The plaintiffs thereby agree to buy the ointment at the price named, to advertise it in their medical almanac, exert their influence to increase sales, not to become interested in the sale of any other ointment, reserving the privilege of buying, selling and becoming agents of any other ointment or salve which their customers require.

The plaintiffs, by their complaint, allege that the defendant has recently sold ointment to several other dealers in this city, and have obtained an injunction restraining the defendant from delivering it to any parties other than the plaintiffs.

The defendant admits, substantially, the selling of the ointment to other parties, but complains that the plaintiffs do not exert themselves to increase the sales, and that they have become interested in another ointment, known as "Redding's Russian Ointment," which they advertise and sell to the prejudice of sales of the ointment manufactured by him, and that, in consequence thereof, the sales of the article have fallen off nearly one-half.

A motion is now made by the defendant, on the pleadings and on the affidavits, to have the injunction dissolved.

Affidavits have also been read, on the part of the plaintiffs,

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to sustain their allegations and defeat those made by the defendant, but all the facts and issues necessary for the decision of this motion are stated above.

Several sufficient reasons exist, in my opinion, for the dissolution of this injunction :

I. The agreement is not fair and equal. The defendant excludes himself wholly from the market, except his retail sales, but the plaintiffs are under no obligation to take or pay for his ointment, except as they require it, or call for it in quantities of 20 to 50 gross. The defendant has no opportunity to tender them the manufactured ointment, and demand payment therefor in money or notes. He must wait till the plaintiffs order the article; he must keep them supplied with not less than twenty gross, at all times, which the plaintiffs are not compelled to receive unless they have ordered it. Although it seems to be contemplated that the plaintiffs would increase the sales of the ointment by their influence, yet they are not under any obligation to do so. They do not undertake to keep the sales up to the point existing when the contract was entered into. Nor do they agree to furnish a market for any fixed amount of the article as a minimum. The interests of the defendant appear to me to have been wholly overlooked, in settling the terms of this agreement; whether this omission arises from want of intelligence on the part of the defendant, or from overreaching design on the part of the plaintiffs, or from mutual confidence and neglect of both parties, it is not necessary to inquire. When a specific performance of a contract is demanded, the courts hold that its provisions must be fair and equal, or they will leave the parties to their action at law.

II. It would be impossible for a court of equity to ascertain whether the most essential provisions of this contract, on both sides, have been complied with, under a decree of specific performance, should such a decree be pronounced.

The compounding of this ointment is a secret, known only to the defendant; whether the defendant combines the proper ingredients, or what these ingredients are which constitute the

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valuable qualities of the article, or in what proportion they are to be combined, neither the court, nor any referee whom the court might name, would be able to decide.

The difficulty, also, of ascertaining whether the plaintiffs do, in good faith, exert their influence to increase the sales of the defendant's ointment, on the other hand, might be beyond the means which the court can exercise.

In either case, the decision of the court would be wholly nugatory, unless it can be known with certainty when performance or compliance with the decree has been made. No referee could report anything more than a probability—a guess—whether the defendant was, or was not, in contempt for non-performance of such decree in this case.

Besides, I am not free from doubt whether the plaintiffs do exert their influence, in good faith, to promote the greatest possible sales of the article in question.

III. The parties have themselves provided the actual measure of damages to be paid by the defendant, in case of a violation of this contract by selling the article to other parties, viz: two gross to be paid for every one sold. No provision of a specific nature is, however, provided, in case of any violation by the plaintiffs, but the defendant is left to such uncertain damages as he can succeed in showing, in a case when the facts constituting a breach would be necessarily known almost exclusively to the plaintiffs, and where evidence of facts, proving the breach of the damage, would not very probably be within the knowledge of the defendant.

I think this is a proper case to leave the parties to their remedy by an action of damage, in case a violation of the contract has happened.

An order must be entered dissolving the injunction, with ten dollars costs of the motion to the defendant, to be costs in the action.

SUPREME COURT.

THE PEOPLE agt. MORTIMER SHAY.

A conviction and sentence, under the Revised Statutes, of a person for *petit larceny*, does not render him an *incompetent witness* in any case. *Petit larceny* is not a *felony* by statute, although it may be at common law, as to all questions controlled by the common law.

Although *particularity* is required in an indictment for murder, yet, where it is apparent that the allegations are substantially sufficient, a clerical mistake will be disregarded.

New-York, General Term, March, 1860.

Present, SUTHERLAND, ALLEN and BONNEY, Justices.

WRIT OF ERROR for a new trial on conviction of murder.

HENRY L. CLINTON, *for motion.*

NELSON J. WATERBURY, *district-attorney, opposed.*

By the court—SUTHERLAND, Justice. At the last oyer and terminer held in this city, the prisoner, Mortimer Shay, was tried on an indictment for the alleged murder of one John Leary, and was convicted.

The case comes before this court by writ of error.

On the trial, among other witnesses, one Stephen Leary was called, and sworn as a witness on the part of the people, and the testimony which he gave was material to the issue.

It appearing that Stephen Leary had previously been convicted of *petit larceny*, at a court of general sessions of the peace, held in and for the city and county of New-York, by a copy of the record of his conviction properly certified and introduced in evidence by the counsel for the prisoner, the counsel for the prisoner thereupon moved that the evidence of the said Stephen Leary be stricken out.

The court denied such motion, and refused to strike out such evidence; and the counsel for the prisoner then and there duly

excepted to such refusal of the judge to strike out Stephen Leary's testimony.

The first question presented by the writ of error is, Did the judge err in refusing to strike out this testimony; or, in other words, was Stephen Leary a competent witness, notwithstanding his previous conviction of petit larceny?

The three chapters constituting the fourth part of the Revised Statutes, were passed as one act. That act is entitled "An act concerning crimes and punishments," &c.

By section one of title six of chapter one of that act, (2 *Rev. Stat.* 690), petit larceny is defined to be the "stealing, taking, or carrying away the personal property of another, of the value of twenty-five dollars or under;" and that section declares that the punishment of petit larceny shall be "imprisonment in a county jail not exceeding six months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment."

Section twenty-three of title seven of the same chapter (2 *Rev. Stat.* 701,) declares that "no person, sentenced upon a conviction for felony, shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless pardoned," &c.; but that "no sentence, upon a conviction for any offence other than a felony, shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter or proceeding, civil or criminal."

Section thirty of the same title seven (2 *Rev. Stat.* 702,) declares that "the term felony, when used in this act, or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a state prison."

It would appear to follow so clearly and conclusively, from these statutory provisions and definitions, that Stephen Leary was a competent witness in this case, notwithstanding his previous conviction of petit larceny, and that the judge did right in refusing to strike out his evidence, that it is difficult to see how even a question could be raised on that point. One provision of the act is, that no conviction, for any offence other

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than a *felony*, shall disqualify or render any person incompetent to be sworn, or to testify; and another provision of the same act defines the word "*felony*," *when used in the act*, to be an offence punishable by death or imprisonment in a state prison; and, by a third provision of the same act, the offence of petit larceny is defined; and it is declared to be punishable not by death or imprisonment in a state prison, but by fine or imprisonment in a county jail, or by both such fine and imprisonment.

It follows so plainly, from these statutory provisions, that Stephen Leary was a competent witness, notwithstanding his previous conviction of petit larceny, that one would hardly look for, or expect to find, an authority outside of the statute on that point.

The case of the *People agt. Alder* (3 *Parker*, 249,) does not at all interfere with the plain construction of the statute. That case decides only that the definition of the word felony, in the Revised Statutes, applies only where the word is used in a statute, leaving petit larceny still a felony as at common law "in respect to all questions controlled solely by the common law." The question in the *People agt. Alder* was such a question, unaffected by the statutory definition.

On the cross-examination, by the district-attorney, of Thaddeus Spencer, a witness called and sworn for the prisoner, the district-attorney put this question to the witness: "Do you know that the prisoner had a cutting match with any one previous to the killing of Leary?"

The witness was allowed to answer this question, after objection by the counsel for the prisoner. The answer was: "I do not."

As the answer could not possibly prejudice the prisoner, it is unnecessary to inquire whether the question, in reference to the testimony which had been given by the witness on his direct examination, was or was not proper.

The remaining question in this case is raised on the face of the indictment. That question is, whether the indictment, in charging the offence, sets forth with sufficient particularity and

certainly, the manner of the death, and the means by which it was effected? The counsel for the prisoner insists that the indictment is fatally defective in this respect, and does not charge the crime of murder within the rules of criminal pleading, and, therefore, moves that the judgment be arrested.

The indictment, after alleging, in the usual manner, that the prisoner, on a certain day, at the first ward in the city of New-York, with force, &c., on and upon John Leary, wilfully, feloniously, &c., did make an assault, and then proceeds as follows: "And that the said Mortimer Shay, a certain knife, which he, the said Mortimer Shay, in his right hand then and there had and held, him, the said John Leary, in and upon the forehead, then and there wilfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said John Leary, then and there, *with the knife aforesaid*, in and upon the forehead of him, the said John Leary, one mortal wound, of the breadth of one inch, and of the depth of three inches, of which mortal wound he, the said John Leary," &c.

The counsel for the prisoner insists that the evidently clerical mistake in the omission of the word *with*, before the description of the weapon, renders the indictment fatally defective; that although the indictment alleges that the fatal wound was given with the knife, yet, that in consequence of the omission of the word *with* before the word *knife*, in the preceding portion of the indictment, it is not alleged that the fatal *blow* or *stab*, &c., which caused the mortal wound, was given with the knife; that it does not appear, nor is it alleged, that the knife caused the mortal wound.

Now, without examining the authorities cited by the counsel for the prisoner to show the particularity required, in an indictment for murder, in setting forth the manner of the death and the means by which it was effected, and conceding, for the purposes of this question, that the indictment in this case should have substantially alleged that the mortal blow or stab was struck or made with the knife, yet I think this indictment does, in fact, so substantially allege. The indictment distinctly and

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certainly alleges three things: 1st. That the prisoner then and there had and held in his right hand a certain knife. 2d. That he did then and there beat, strike, stab, cut and wound the deceased. 3d. That he then and there gave unto the deceased, on and upon his forehead, with the knife aforesaid, one mortal wound, &c.

Now, is not this substantially alleging that the blow, stab, &c., were given *with* the knife?

It is certainly plainly alleged that the prisoner struck the deceased, having in his right hand a knife, and that he gave the mortal wound with the knife. Is not this substantially alleging that the prisoner struck the deceased with the knife, and that the knife caused the mortal wound? I think it is, and that the death, and the means, and manner, in and by which it was effected by the prisoner, is sufficiently and certainly charged in the indictment.

In my opinion, the judgment of the oyer and terminer should be affirmed.

NEW-YORK COMMON PLEAS.

DIBALD MILLEMAN and FREDERICK MILLEMAN agt. THE
MAYOR, &c., OF THE CITY OF NEW-YORK.

On an application, by the comptroller of the city of New-York, to open *judgments* obtained against the city upon the alleged ground of collusion and fraud, under the statute of 1859, the court may, where the circumstances warrant it, refuse to grant the application under the statute, but allow it as an application of a *client* to be relieved from the result of the *gross negligence of his attorney*.

New-York, Special Term, March, 1860.

Present, Hon. HENRY HILTON, Judge.

THIS was an application on behalf of the comptroller to vacate and set aside a judgment for \$13,974.58 obtained by

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the plaintiffs, against the corporation, on the 26th of September, 1859. From the affidavit of the comptroller, and other papers read on the motion, it appeared that the action was commenced on the 27th of October, 1858; that no writ was served by the then corporation counsel to the corporation in the action, until the 26th of September, 1859; that the action was brought by the plaintiffs as the assignees of Thomas J. S. Blumenrother, who had made a contract with the defendants for paving, regulating, &c., Tenth avenue, Forty-fifth to Fifty-fifth streets, the contract being dated 13th, 1853. The complaint alleged that Blumenrother, at the time of making the contract, requested plaintiffs to become sureties for the performance of the work under the contract and to make advances to him to enable him to pay his workmen and furnish materials for the work, and agreed to assign to the plaintiffs the said contract, and the moneys to grow thereunder from the defendants, and did execute an assignment to the plaintiffs thereof on the 16th of May, 1853; the plaintiffs thereupon executed a bond to the defendant for the faithful performance of the work, under the contract with Blumenrother. The complaint also alleged that the plaintiffs during the performance of the work under the contract with Blumenrother, made advances to him amounting to \$10,015.07, and also alleged the completion of the work and confirmation of the contract by the common council, and demanded judgment for the said sum of \$10,015.07, with interest from June 1st, 1854.

The answer of the defendants alleged that the contract was prohibited from assigning the moneys to grow due under the contract, unless with the consent of the defendants, to be signified by the indorsement of the street commissioner on the contract; that no such consent had been given to the assignment to the plaintiffs, and that the defendants had no notice of the assignment. The answer also averred that Blumenrother did, by the consent of the defendants, signified as provided by said contract, duly assign all his interest therein to the moneys to grow due thereunder to Frederick Pentz, b

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assignment, dated May 28th, 1853, which was filed in the office of the comptroller, and was in all respects legal and valid. It also alleged that the defendants had paid to Pentz on account of said contract, and that there was nothing due to the plaintiffs thereunder.

It appears that the case was referred on August 16th, 1859, and that subsequently the referee made a report in favor of plaintiffs for the full amount claimed; but, by a certificate of the referee, it was shown that no attempt whatever was made by the counsel to the corporation to prove the assignment or the payment to Pentz on the trial, but confined himself solely to a cross-examination of the plaintiffs' witnesses.

The papers further showed that the assignments and payments to Pentz could have been easily proved by the street commissioner or his assistants, and that the corporation counsel had been put in full possession of the facts by a communication from the deputy street commissioner, in writing, long prior to the service of the answer or the trial of the action; that the corporation counsel appealed to the general term, but made no case, and took no steps to prosecute the appeal, and that subsequently the appeal was dismissed, and the judgment affirmed by the general term by default.

The application was made by the comptroller under the fifth section of the act of 1859, allowing him to move to set aside judgments against the city which were obtained by collusion, or founded in fraud; the present corporation counsel consenting, however, to the application.

The plaintiffs, by affidavits, denied all fraud or collusion in the matter, and insisted that their claim was a just and *bona fide* one, and that the judgment should not be disturbed.

A. R. LAWRENCE, JR., *for the motion.*

C. A. MAY and M. E. STEMLER, *opposed.*

The judge granted the motion to open the judgments; and, in doing so, stated that the application should be regarded as of a two-fold character: 1st, Either as an application for relief

under the statute of 1859; or, 2d, As a motion on the part of a client, to be relieved from the result of a gross negligence of his attorney. That, as all fraud was denied by the plaintiffs, and as there was no ground for any suspicion of fraud or collusion on the part of their attorney or their referee, he preferred to base his decision upon the latter ground, and would, therefore, allow the defendants to come in and defend on payment of costs.

SUPREME COURT.

JOHN J. PALMER, Special Receiver, &c., agt. JAMES B. MURRAY and others.

Where, in an action for the foreclosure of a mortgage by the plaintiff as a *special receiver*, an agreement was entered into and consummated by the plaintiff and the mortgagor, by which a portion of the mortgage debt was paid by the mortgagor, and his new bond taken, secured by a mortgage upon the same premises (except one lot which had previously been sold), for the balance, whereupon the plaintiff executed releases of the premises from the first mortgage; and it was agreed that the sum so paid and the substituted mortgage should be retained and held by the plaintiff as a substitute for and in the place of the original premises, and as subject to the original mortgage (the mortgage in suit) in like manner and to the same extent as said premises were subject to said mortgage, and not otherwise, and that the original bond of the mortgagor should not be affected by the agreement, and prescribing certain terms and conditions in reference to the sale of the mortgaged premises by the plaintiff, and the disposition and liability of all the funds received therefor,

Held, that the agreement was not a settlement and determination of the controversy between the parties; it was made for their mutual convenience, without disturbing or in any way affecting the claim of either; the form of the securities and the situation and character of the fund were only slightly changed.

This altered state of the securities and fund, by and under the agreement, prevented a final decree for the foreclosure and sale of the mortgaged premises in this action; but presented a proper case for a *supplemental complaint*, as the agreement was new matter arising since the filing of the original complaint, but did not vary the rights of the parties.

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The original plaintiff having died pending the action, *held*, that his successor was authorized to continue the action, in the name of the new special receiver, by *supplemental complaint*.

New-York, Special Term, March, 1860.

PETITION, by Charles A. Davis, appointed special receiver as the successor of John J. Palmer, deceased, for leave to file a supplemental complaint, and that the suit be continued in his name, as the successor of Palmer, as such special receiver.

GEO. N. TITUS, *for petitioner*

SIDNEY S. HARRIS, *for defendants.*

ALLEN, Justice. This suit was commenced in 1845, in the late court of chancery, to foreclose a mortgage given to the President of the North American Trust and Banking Company, upon several lots in the city of New-York, and which mortgage had come to the hands of the plaintiff as special receiver appointed by the court of chancery. The cause was put at issue by a replication to the answer of the defendants; proofs were taken, and the set-off or counter-claim of the defendant, set up in the answer, was refused.

In January, 1851, the mortgagor and the special receiver entered into an agreement respecting this and another mortgage upon other property, reciting the pendency of this suit undetermined, and the sale of one of the lots mortgaged, the proceeds of which were held by the special receiver as subject to said mortgage, by which the special receiver agreed to release and discharge the several lots from the lien of the mortgage, upon being paid a certain amount in money, and receiving security upon the same lots for a certain other sum specified, and that the sum so paid in cash, less the amount necessary to pay the taxes and assessments charged upon the premises, together with the substituted mortgage, or the new mortgage to be given upon the several lots, should be retained and held by the special receiver, as a substitute for and in place of the said lots, and as subject to the mortgage, to foreclose which

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this suit was brought, in like manner and to the same extent as said lots were then subject to such mortgage, and not otherwise, or for any other or different purpose. It was further agreed, that the personal liability of the mortgagor, for the payment of his bond, should not be in anywise impaired, increased, or affected by the agreement, or anything which should be done under or in pursuance thereof, and that all moneys which the special receiver should receive as the proceeds or value of the lots, and in pursuance of the agreement, after the payment of all taxes and assessments, should be deposited and kept at interest in the New-York Life Insurance and Trust Company, until some further agreement should be made between the parties, or until the rights of said parties, or their representatives, to or in the said lots, or the proceeds thereof, should be determined by the judgment or decree of some court having jurisdiction in the premises; and that, upon such determination, the said proceeds should be disposed of and treated in the same manner as said lots would have been had they remained subject to said first mortgage.

In February, 1851, the agreement was fully carried into effect, and the mortgagor paid to the special receiver, in cash, upon the mortgage in suit in this action, the sum of \$6,800, and gave his bond, secured by a mortgage upon twelve of the sixteen lots before mortgaged for \$6,700, and the special receiver executed the releases of the lots from the first mortgage, in pursuance of the agreement. No further steps were taken in the action, and in February, 1858, Mr. Palmer died, and the petitioner was appointed special receiver in his place.

The agreement between the parties in the release of the mortgaged premises, on execution of it, did not settle and determine the controversy between the parties. There was no settlement, adjustment, or compromise of the claims of the litigant parties to this action. The arrangement did not change the relation of the parties to the fund in dispute, but was made for their mutual convenience, without disturbing or in any way affecting the claim of either; and the agreement, in terms, contemplates a further litigation, unless it should be

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obviated by an amicable and final arrangement. The substance of the controversy and litigation remained the same, while the form of the securities, and the situation and character of the fund, were slightly changed. Hence the suit was not discontinued, nor any provision made for its disposal, or for the costs which had already accrued. The bond of the mortgagor was not surrendered or cancelled, neither was the mortgage satisfied, although every parcel of the mortgaged premises was discharged from its lien, and the suit is spoken of as still pending undetermined. As a suit for the foreclosure of the mortgage, it could not have been prosecuted to a final decree for the foreclosure and sale of the mortgaged premises. Perhaps, under a proper stipulation, the parties might have litigated the action in its present form to a final decree, with a view to settle the rights of the parties to the fund in its altered condition, and enable the parties to settle upon the basis of the final decree. But there was no difficulty in framing a supplemental bill, under and by which the questions at issue between the parties might have been presented in proper form to, and settled by, the court, and by which the parties would have had the benefit of the litigation to the extent that it had progressed—thus preventing unnecessary delay and expense which would have ensued from commencing *de novo*. It is true, the plaintiff might, by a new action, have had the rights of the respective parties to the fund determined, or such action might have been commenced by the mortgagor claiming the fund on deposit, and to have the substituted securities cancelled.

But, whatever form the litigation might have assumed, it would necessarily have to be determined upon facts existing anterior to the commencement of this action. It would have been, of course, to permit a supplemental bill to be filed by Mr. Palmer. It is the appropriate remedy to bring before the court any new matter which has happened since the filing of the bill; and it is proper, not only for the purpose of putting in issue new matter which may vary the relief prayed in the original bill, but also to put in issue matter which may form

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the plaintiff's right to the relief originally prayed. The new events, or new matters, must not change the rights or interests of the parties before the court, for, if they do, the bill will not be strictly supplemental. (*Story's Eq. Pl.*, §§ 332, 336.) The new matter here does not vary the rights of the parties. When a party has an inchoate right at the time of filing his original bill, but which merely requires a formal act to complete it, which is not performed till afterwards, such formal act may be brought before the court by supplemental bill. (2 *Barb. Ch. R.* 61.) So, when an original bill is filed by a judgment creditor to reach property of the defendant after the return of an execution unsatisfied, a supplemental bill may be filed to reach subsequently acquired property. (*Eager agt. Price*, 2 *Paige*, 333; *Mutter agt. Chancel*, 5 *Russ.* 42.) The agreement, and the acts of the parties in pursuance of it, so altered the condition and character of the securities and fund, that the proper relief in respect thereof could not have been obtained under the original bill, and therefore it would have been a fit case for a supplemental bill at the suit of Mr. Palmer in his lifetime. (*Adams agt. Dowding*, 2 *Mad.* 53; *Milner agt. Lord Harwood*, 17 *Vesey*, 144.) But the death of Mr. Palmer, the original complainant, occurring, and the petitioner having succeeded to his position and rights as special receiver, the action, if continued, must be continued in the name of the new receiver; and this can only be done by a bill of revivor, or by a supplemental bill. If this event was the only event to be entered in the bill for the continuation of the suit, it would seem that a supplemental bill would be proper, rather than a bill of revivor—the rule being that when the interest of a complainant, suing in *autre droit*, determines, the suit must be continued by supplemental bill, and not by bill of revivor. (*Metc.* 51; *Cooper's Eq. Pl.* 75.) But, be this as it may, the change of parties, as well as the other events which must modify the form of the relief to be granted, made a supplemental bill necessary. An order of the court is necessary to the filing of a supplemental bill; but, in ordinary cases in chancery, the defendant is not entitled to notice of the application for such

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order, (*Eager agt. Price, supra; Lawrence agt. Bolton, 3 Paige, 294*); and the court will only examine the application so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. If the supplemental bill be filed without sufficient grounds, the defendant may demur. (*Lawrence agt. Bolton, supra; Tonken agt. Littlebridge, Cooper, 83.*) The laches of Mr. Palmer, and the delay in the prosecution of the suit, is urged as a reason for refusing this application. But the fund is in the court—that is, in the hands of the petitioner, who is an officer of the court, and his title to and right to retain it is controverted, and it is fit and proper that the right should speedily be determined.

The defendant cannot complain of the delay, for the reason that he might have expedited the suit if he had chosen to do so; and to deny the motion would only cause still greater delay, by compelling a new action, either by the petitioner or the defendant.

The prayer of the petition must be granted.

NEW-YORK COMMON PLEAS.

EGBERT L. VIELE agt. JOHN A. C. GRAY.

To charge a man with *publishing* an obscene caricature, which was also a *libel* upon individuals, is to impute to him an *indictable offence*, and the charge is actionable *per se*. And to say of a man that he *published a libel*, is actionable *per se*.

And where a libel has been *published*, it is actionable to say that a man is the *author* of it.

Where the alleged slanderous statement is presumptively *privileged*, there must be a sufficient averment of *malice* to sustain the action. And a general averment in the complaint that the words were spoken *falsely and maliciously*, is sufficient.

Where, as in this case, the action, though in form for *slander*, is sufficiently analogous to demand the application of the rule that prevails in actions for malicious prosecution, requiring *proof of the want of probable cause* to sustain it, *held*, that

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a statement or averment in the complaint, denying that the plaintiff had any knowledge or complicity in the matter charged, was sufficient, as it was all that he would be required to prove to make out, *prima facie*, the want of probable cause.

New-York, Special Term, December, 1859.

THE complaint avers:

1. That at the time of the alleged slander, the defendant was one of "the commissioners of the Central Park."

2. That before that time the plaintiff had been employed on the park as chief engineer.

3. That in April, 1858, on the invitation of the commissioners, plans for the improvement of the park were submitted to them, and that, among these plans, was one by Olmstead & Vaux, which they designated "Greensward."

4. That said plan was adopted by the commissioners, and Olmstead was appointed by them chief architect.

5. That shortly afterwards "a certain obscene, scandalous, and criminal libel was published of, and concerning Olmstead & Vaux, and the editor of the *Evening Post*, by some one unknown to the plaintiff; said libel being the caricature annexed, copies of which were, by some person unknown to the plaintiff, sent to the commissioners."

6. That on the 9th of September, 1858, Thomas C. Field, one of the commissioners, submitted to the board of commissioners, at a meeting held on that day, the following resolution:

"Resolved, That the architect-in-chief be requested to employ E. L. Viele (meaning thereby the plaintiff,) as engineer on the park, (meaning thereby the said Central Park), at a salary of not exceeding twenty-five hundred dollars per annum."

That thereupon the defendant, addressing Mr. Belmont, one of the commissioners, falsely and maliciously spoke, of and concerning the plaintiff, the false, slanderous and defamatory words following:

"Have you seen Mr. Viele's card?" Whereupon said Belmont asked defendant, "What card?" or words to that effect; to which defendant replied: "The caricature with reference

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to Greensward, which has been sent to the members of the commission," meaning thereby the obscene and libelous caricature aforesaid. That thereupon the said Field said he did not believe that said Viele was the author of said caricature, or words to that effect; to which the defendant replied: "He is the author of it; I know it."

7. That the plaintiff is not the author or publisher of the caricature.

8. That the plaintiff has been damaged by the conversation, in his reputation, to the amount of \$10,000.

9. That, by means thereof, the resolution was lost, to the damage of the plaintiff of \$10,000.

The defendant demurs to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action.

CLARENCE A. SEWARD, for defendant, argued,

The constitutions of the United States (*Adment 1*), and of the state of New-York (*Article 1*, § 8,) prohibit the passage of any law restraining or abridging the liberty of speech. The bill of rights, (1 *R. S.* 94, § 1), following out this provision, declares "that every citizen may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right."

Has the defendant abused that right?

I. The complaint treats the alleged words—

1st. As being actionable *per se*.

2d. As having occasioned special damage.

First. What words are actionable *per se*?

The rule seems to be, that where the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words are in themselves actionable. (*Brooker agt. Coffin*, 5 *Johns.* 188; 1 *Am. Lead. Cas.* 98, and cases there cited. *Crawford agt. Wilson*, 4 *Barb. S. C. R.* 504; *Young agt. Miller*, 3 *Hill*, 21.)

But it is not enough to show that, if the words are true, the

plaintiff could be subjected to a criminal prosecution ; it must also be shown that the offence charged imputes moral turpitude, or something infamous and disgraceful in a general sense. (*Per DALY, J., in Quinn agt. O'Gara, 2 E. D. Smith, 388.*) It is not sufficient that the alleged words impute the violation of a penal or a criminal law ; they must go further, and charge the plaintiff with an offence which involves moral turpitude, or would subject him to an infamous punishment. (*Hoag agt. Hatch, 23 Conn. 585 ; S. C., 18 Monthly Law Rep. 680 ; Martin agt. Stillwell, 13 Johns. 275.*)

There is no criminal statute in this state punishing libels, and, therefore, if they are punishable at all, they are punishable only as misdemeanors at the common law. There is but one statute in relation to indictments for libel, and that is to be found in the Laws of 1852, chapter 165, and prescribes where an indictment therefor is to be tried. The punishment prescribed by statute for misdemeanors (2 *R. S.* 697, § 40,) is imprisonment in the county jail not exceeding one year, or a fine of \$250, or both such fine and imprisonment. Such punishment is not *infamous*. The same punishment is prescribed for keeping a bawdy-house, and that has been decided not to be infamous. (*Martin agt. Stillwell, 13 Johns. 275.*) Besides, the legislature have defined the term "infamous crime" to include "every offence punishable with death, or by imprisonment in a state prison, and no other." (3 *R. S.* 702, § 31.) *Infamous* punishment can, therefore, be inflicted for *infamous* crimes only ; and if the plaintiff had, therefore, been charged with the publication of the alleged libel, such charge would not have been actionable *per se*.

Again : The plaintiff was not charged with any crime, or with having been privy to any crime whatever, and, therefore, the alleged words are not actionable *per se*. The plaintiff is charged with having been "*the author*" of a caricature. The charge "hath this extent, no more ;" and that "trespass is deemed worthy the shame which here it suffers." To constitute a slander, in alleging that the plaintiff has committed a crime, the crime must be fairly charged, or, in other words, the

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charge must convey to the hearer an express imputation of some crime liable to punishment. (*Holt* agt. *Scholefield*, 6 *Term Rep.* 691.) No crime has been imputed to the plaintiff, for the reason that neither at the common law, nor by statute, is it a misdemeanor, felony or other crime, to design, or to be "the author" of a caricature. There is no inhibition in the law against the employment of one's pencil for his own gratification. The gist of the offence consists in the malicious publication of the caricature, and that publication must, in order to support an indictment, be averred. (*Barbour's Crim. Law*, 237; *Rex* agt. *Williams*, 2 *Camp.* 646; *Rex* agt. *Hunt*, *id.* 583.) And in an action on the case, it must also be averred. (1 *Saund.* 242, *n.*) The plaintiff, in his complaint, has *ex industria* denied that he published the libel. This denial was a work of supererogation, inasmuch as the defendant did not aver that the plaintiff had published the caricature, or had been privy to its publication. The charge did not, therefore, impute to the plaintiff any crime whatever, and hence the words are not actionable *per se*.

Second. The plaintiff seeks to recover \$10,000 for alleged special damage sustained by him, and that special damage, in the words of the declaration, is: "Plaintiff further says, on information and belief, that by means of said slander, and the uttering thereof at said meeting, that the said resolution was lost, to the damage of plaintiff of ten thousand dollars."

The action on the case for slander, when special damage is averred, as a general rule, pre-supposes that the words are not actionable *per se*, but that, by reason of their uttering, third persons have been so influenced that the plaintiff has been subjected to some pecuniary loss. That pecuniary loss must be wholly and exclusively the consequence of the words spoken by the defendant, (*Halleck* agt. *Miller*, 2 *Barb. S. C. Rep.* 630; *Terwilliger* agt. *Wands*, 25 *id.* 313); and it must be the natural and immediate consequence of the speaking of the words. (*Beach* agt. *Ranney*, 2 *Hill*, 314.) No evidence can be received of any loss or injury which the plaintiff has sustained by the speaking of the words, unless it is specially stated in the com-

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plaint. (*Herrick* agt. *Lapham*, 10 *Johns*. 281.) The object of this rule is to prevent the defendants being taken by surprise.

Under the present system of pleading, there is another rule, which requires the plaintiff to state all the facts which he expects to prove, tending to show that the special damage complained of, was the natural and necessary consequence of the alleged slander, and that is, that, if they are not so pleaded, they are not available to the plaintiff proving them. (*Kelley* agt. *Western*, 2 *Comst.* 506; *Field* agt. *The Mayor*, 2 *Seld.* 179.) The rule is well settled by Ch. J. JONES, in *Shipman* agt. *Burrows*, (1 *Hall Sup. Ct.* 414), in these words: "The particular persons by whom the plaintiff was injured in consequence of the defamatory words, must be within his own knowledge, and they must be so particularized in the declaration as that the defendant may have notice of the cause of complaint, and be enabled to meet it if the particular charge be false. The plaintiff has no right to conceal this knowledge and throw the burden upon the defendant of preparing his defence by making inquiries of every person, under the uncertainty as to what particular person the plaintiff might direct his proof."

The plaintiff states, in his complaint, that the defendant is one of the commissioners of the Central Park. That, at a meeting of those commissioners, another commissioner offered a resolution that the architect-in-chief be requested to employ the plaintiff as chief engineer, and that, in consequence of the alleged slander, such resolution was lost. These averments necessarily bring before the court the act of 1857, chapter 771, appointing these commissioners, and defining their duties. Section 2 of this act appoints eleven commissioners, who are designated in section 3, and requires a majority of the board to pass a final and binding vote. The plaintiff, therefore, requires the court to assume that there were six commissioners present at this meeting, and that the entire six were influenced by the alleged slander, and by that alone, to vote against the resolution. The complaint should have averred who were present at the meeting, that they constituted a majority of the board, and that, but for the alleged slander, each one of the six

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would have voted for the resolution. In other words, he should have "particularized, in his complaint, the particular persons by whom he was injured in consequence of the defamatory words," and should have alleged that "the special damage was *exclusively* the consequence of the words spoken." (*Terwilliger agt. Wanda*, 25 *Barb. S. C. R.* 313.) Undoubtedly the plaintiff must allege all that he must prove at the trial. He must prove—

1. That there were six commissioners at the meeting
2. Who they were.
3. That they were in favor of the resolution, and would have voted for it, but for the alleged slander.
4. That the architect-in-chief, if the resolution had been passed, would have employed the plaintiff.
5. The complaint contains no averments as to any of these facts, and, therefore, does not present a case of special damage. The plaintiff must know what commissioners were influenced by the alleged slander, and "he has no right to conceal that knowledge, and to throw the burden upon the defendant of preparing his defence by making inquiries, of" the ten other commissioners, as to the effect of his statements upon their votes.

II. It affirmatively appears, from the averments in the declaration, that the alleged words were privileged.

(a) The defendant is a public officer, appointed by the legislature of the state, and is required to take the usual oath of office, and is vested, as one of the commissioners of the Central Park, with authority to appoint engineers, surveyors, clerks and other officers.

(b) The plaintiff was an applicant for office under the commissioners. A resolution was offered, at a meeting of the commissioners, to the effect that the architect-in-chief be requested to employ the plaintiff as chief engineer. While this resolution was pending, the defendant made to the commissioners, and to no other person, the alleged slanderous statement. Such statement, as interpreted by the other averments in the complaint, was manifestly privileged.

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(c) The constitution of New-York (*Article 3, § 12*.) provides that, "for any speech or debate in either house of the legislature, the members shall not be questioned in any other place." Such speeches and debates are, therefore, absolutely privileged.

(d) The law extends a similar privilege to others. For example :

1. To counsel—against whom no action can be maintained for pertinent words spoken without malice in a judicial proceeding. (*Hodgson agt. Scarlet, Holl, 620.*) And within these limits the protection is complete, and no private action or public prosecution can be maintained therefor, however false the charge may be. (*Gilbert agt. The People, 1 Denio, 41; Hastings agt. Lusk, 22 Wend. 410.*)

2. There are many other cases of the same character. They may be summed up as follows :

1st. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interest.

2d. When the words are used by a master, in giving the character of a servant who has been in his employment.

3d. When the words are used in the course of a legal or judicial proceeding.

4th. When the words are used in the ordinary mode of parliamentary proceedings—as in a petition. (*White agt. Nicholls, 3 How. U. S. 266; Cook agt. Hill, 2 Sandf. 841.*)

(e) The present case falls within the first of these subdivisions. The words were uttered by a public officer, with reference to a person soliciting office from the board of which such public officer was a member, and which was competent to decide upon the petition of the applicant. (*Hosmer agt. Loveland, 19 Barb. 111.*) They were pertinent, because they related to the applicant, and charged him with having designed a caricature of a peculiar character, and one referring to former action by the board; and the charge, if true, was proper to be taken into consideration by the board, in deciding upon the plaintiff's application. It is upon this principle, that a statement made by

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a bank director, at a meeting of the board, in relation to the solvency or circumstances of the customers of the bank, or of any other person, are held privileged. Such statement, when made with reference to a person asking for the discounting of his note, or to be employed by the bank, are pertinent, and the legal presumption is, that the motive of the director making them was to guard the interests of the institution; and the time and place when and where they were made, show that they were intended as a confidential communication. (*Sewall agt. Catlin*, 3 *Wend.* 291. See, also, the analogous cases of *Bradley agt. Heath*, 12 *Pick.* 163; *Jarvis agt. Hathaway*, 3 *Johns.* 180, and cases cited in 1 *Am. Lead. Cases*, 183, 184.)

(f) The question whether a communication is, or is not privileged, is a question of law, and may be raised by demurrer, (*Hosmer agt. Loveland*, 19 *Barb. S. C. R.* 115; *Fry agt. Bennett*, 5 *Sandf. S. C. R.* 54, 72;) and it is, therefore, a question for the court, and not for the jury, to decide.

The defendant made, to his co-commissioners, a statement with regard to the plaintiff. The defendant is a public officer, charged in common with the public duty of superintending the laying out and adornment of the Central Park, so that it may become a retreat for our citizens, affording them opportunities for amusement, social intercourse, and the acquisition of health. To accomplish this, and to produce from an uncultivated waste an ornamental park, with its hills and valleys, walks and lawns, trees and fountains, is a work of labor, requiring laborers by the hundred. They are of every grade, from an architect-in-chief to a man with a pick-axe, and the selection of all these laborers is confided, by law, to the defendant and his coadjutors. Are they not protected in stating at their meetings what they know, or think they know, in regard to those who ask them for employment? Can it be that no public officer can state, to those in like authority and position with himself, that he knows or thinks an applicant for office to be unfit, for this or that given reason, for the appointment? If he cannot, then, in the language of L'Hommedieu, senator, in *Thorn agt. Blanchard*, (5 *Johns.* 520): "No person can complain or tell

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his opinion respecting officers, or those wishing to become such, without being liable to be harrassed in a court of law, and be put to great expense, even if he can prove his opinion correct."

(g) If the communication is privileged, it follows that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication, and throws upon the plaintiff the onus of proving *malice in fact*. (*White* agt. *Nicholls*, 3 *How. U. S.* 266, 287; *Van Wyck* agt. *Gulirie*, 4 *Duer*, 268; *Thorn* agt. *Moser*, 1 *Denio*, 488; *Thorn* agt. *Blanchard*, 5 *Johns.* 509; *Sikes* agt. *Dunbar*, 1 *Camp.* 202, n.; *Vanderzee* agt. *McGregor*, 12 *Wend.* 545.)

But the plaintiff must go further, and prove *want of probable cause*. The action of slander upon a privileged communication is assimilated to an action for malicious prosecution, where the want of probable cause must be proved by the plaintiff. (*Cook* agt. *Hill*, 3 *Sandf. S. C. R.* 341, 349; *Howard* agt. *Thompson*, 21 *Wend.* 320, 330.) Proof of malice alone will not sustain the action. From the want of probable cause, malice may be implied; but the want of probable cause cannot be implied from the most express malice. The want of probable cause must, therefore, be substantially proved, (*Murray* agt. *Long*, 1 *Wend.* 140), and cannot be implied. (*Johnstone* agt. *Sutton*, 1 *Term Rep.* 544.) The proof of express malice appears to consist, in all cases, in showing *mala fides* in the defendant—that is, that the occasion was made use of colorably as a pretext for wantonly injuring the plaintiff. (1 *Am. Lead. Cas.* 181.)

(h) It has already been stated that facts proved, but not alleged, are not available to the party proving them. Has the plaintiff in his complaint alleged either the express malice or the want of probable cause, so as to permit their being proved at the trial? The allegation is "did falsely and maliciously speak." It is not enough to allege that the defendant "*ex malitia et sine causa per quod, &c.*" The express malice and the want of probable cause must be alleged "*in totidem verbis*," with a statement of the facts which it is claimed will prove the

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allegation. (*Reynolds* agt. *Kennedy*, 1 Wils. 232.) The question of express malice is a question of fact for the consideration of the jury, (2 *Saund. Pl.* 195), and the question of probable cause, involving the sincerity of the defendant, is also a question of fact. (*Id.*)

(i) If the communication is privileged, the defendant has a right to require the plaintiff to specify, in his complaint, the particular facts upon which he intends to rely, to disprove the legal presumption of want of malice. Those facts constitute the very gist and essence of his action, and, under the present rules of pleading, he cannot be allowed, under the general charge contained in an adverb, to surprise the defendant by proof of facts which are not stated in the complaint. This rule under the later decisions is inflexible, and imperatively requires a party, seeking to recover damages for an alleged injury to himself, to specify in his pleading the facts which occasion the injury. The words "maliciously" and "falsely" are not allegations of a fact. They can be used to qualify or to affix an intent to conceded facts; but they cannot fill the place of the facts themselves. Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred. (*Garvey* agt. *Fowler*, 4 *Sandf. S. C. R.* 665.) And these facts must be *physical* facts—that is, something done, said, or written, which can be proved by witnesses, and which must exist prior to an adverbial qualification thereof. No such facts are averred in the complaint, and it fails, therefore, to state a cause of action producing special damage.

R. O. GORMAN, *for plaintiff.*

DALY, F. J. The complaint avers that a scandalous, criminal and obscene libel was published, by some person unknown to the plaintiff, of and concerning Messrs. Olmstead & Vaux, who had submitted a plan for the improvement of the Central Park, and the editor of the Evening Post, being an obscene caricature, a copy of which is annexed to the complaint; and

that the defendant, at a meeting of, and in the hearing of, the commissioners of the Central Park, referring to this caricature, said, of the plaintiff, "He is the author of it; I know it."

The first objection raised by the demurrer is, that this was not imputing to the plaintiff any offence involving moral turpitude, or which would subject him to an infamous punishment. That an indictment would lie for publishing this caricature, does not admit of a doubt. (*Austin agt. Culpepper, Skinner's R.* 128; *2 Holt*, 813; *Anon.*, 11 *Mod.* 99; *Du Bort agt. Beresford*, 2 *Camp.* 511.) It was not only a libel upon the persons designed to be affected by it, but, as an obscene caricature, it was an offence against public morality. (*The King agt. Carl*, 2 *Strange*, 788; 1 *Russell on Crimes*, 233.) The defendant insists, however, that to say of a man that he published a libel, is not actionable *per se*. In *Young agt. Miller* (3 *Hill*, 21,) it was held, that to charge a man with a crime for which he might be indicted, and which would be disgraceful to him in a general sense—that is, which would detract from his character as a man of good morals—was actionable; and, certainly, to charge a man with publishing an obscene caricature, which was also a libel upon individuals, is to impute to him an offence which would have that effect. But the point has been expressly passed upon. It was held, in *Sir William Russell agt. Lignor*, (1 *Roll. Abr.* 46; 1 *D'Au. Abr.* 98; 1 *Vin. Abr.* 423, *Pl.* 27,) that to say of A. "that he made a libel on B.," A. being a justice of the peace, was actionable. It was objected, in that case, that it did not appear what the effect of the libel was; but the court were of opinion that it was enough to say, of a justice of the peace, that he had made a libel, as it was imputing to him an offence for which he could be indicted at common law, and subjected to fine and imprisonment; and, in *Andrews agt. Koppenhafer*, (3 *Serg. & Rawle*, 258), it was held, that words charging another with making a libel were actionable.

It is further insisted that the offence did not consist in designing and drawing the caricature, but in publishing it; and

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that saying that the plaintiff was the author of it, was not charging him with having published it.

It is averred, however, in the complaint, that the caricature had been published before the speaking of the words, by the sending of copies of it to all the commissioners; and to say of a man, after a libel has been published, that he is the author of it, is to convey the imputation that he is connected with the publication, or at least that he was an actor or principal in the criminal act. In the *Queen agt. Lovell*, (9 C. & P. 462), all that was proved against the defendant was, that the manuscript from which the libel was printed was in his handwriting. There was no other evidence to connect him with the printing or the posting of it, yet this was deemed sufficient to sustain the indictment, and upon this evidence alone he was convicted. And Lord TENTERDEN, in *Sir Francis Burdett's case*, (4 B. & Ald. 95), went even further: "I have heard nothing," he said, "on the present occasion, to convince my mind that one who composes or writes a libel, with intent to defame, may not, under any circumstances, be punished if the libel is not published." In the *King agt. Paine* (5 Mod. 163,) the court said, that the making of a libel was an offence, though it were never published; and similar views have been expressed in several cases. (*The King agt. Beare*, 1 Ld. Ray. 414; S. C., 2 Salk. 417; S. C., *Curthrew*, 407; S. C., *Cases Temp. Holt*, 422; S. C., 12 Mod. 218; *Lamb's case*, 9 Coke, 59; *The King agt. Kissell*, 1 Barnds. 305; *The King agt. Williams*, 2 Camp. 646.)

Where, then, a libel has been published, it is very clear, from these authorities, that it is actionable to say that a man is the author of it.

The next question is, whether the statement made by the defendant was a privileged communication? It was made at a meeting of the board of commissioners, of which the defendant was a member—after a resolution had been offered by one of the commissioners, that the architect-in-chief should be requested to employ the plaintiff as engineer of the Central Park. Any communication or statement made in the discharge of a

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legal or moral duty, which may be considered applicable or pertinent to the duty which the party is engaged in discharging, is privileged, however injurious it may be to individuals, unless it appears to have been done from a malicious and mischievous design to injure the character of the person to whom it refers. The commissioners of the Central Park were a public body, discharging, to the extent of the power conferred upon them, the functions of government; and the defendant, as a member of the body, was a public officer. Whatever, therefore, he might say, at the deliberations of the board of commissioners, bearing upon, or having relation to, any matter within their cognizance, would be presumptively privileged. The matter before them, was the propriety of adopting the resolution requesting the architect-in-chief to employ the plaintiff as engineer, and a statement that the plaintiff was the author of a production designed to caricature and hold up to ridicule the plan which the commissioners had adopted for the improvement of the Central Park, whether it were true or not, must be regarded as relevant and pertinent to the subject before them. It is not for a court of law to say that it was a matter which they ought not, or could not, take into consideration. The commissioners alone were to judge of the reasons which should influence them to vote for or against the resolution, and that they considered it material, appears from the averment in the complaint, that in consequence of the statement the resolution was lost. Concluding, then, from the occasion upon which the charge was made, and the relevancy of the subject matter of it, that it was presumptively privileged, the next question raised by the demurrer is, whether there is a sufficient averment of malice? It is insisted that the general averment in the complaint, that the words were spoken maliciously, is not enough. That it is nothing more than an averment of that malice in law, which exists whenever the words are actionable, but that, in a case like this, when it appears upon the face of the complaint that the occasion was a privileged one, the complaint must contain a specific averment of the facts and circumstances which show conclusively that the words were

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spoken from actual malice, or that a good cause of action is not made out.

In passing upon the question of the sufficiency of the complaint in this particular, it will be necessary, first, to have a clear understanding of what is meant in actions of defamation by the term malice, for it must be confessed that there is at present considerable obscurity as to the meaning of this word, or rather as to the sense in which it is to be understood in actions of this nature, growing out of a distinction taken by BAILEY, J., in *Brommage* agt. *Prosser*, (4 B. & C. 247,) between what he calls malice in law, and malice in fact. He says that the law recognizes two descriptions of malice, in actions of slander. That malice, in its common acceptation or popular sense, means ill-will to a person; but in its legal sense, it means a wrongful act done intentionally, without just cause or excuse. I apprehend that there is no ground for distinguishing between the legal and the popular sense of the word, and that it means, in its legal sense, exactly what it means in its popular sense, namely, a mischievous design or intent to do an injury to an individual or to the public. *Crabbe*, in his work on *English Synonyms*, after tracing the word to its Latin root *malus*, bad, defines it to be the very essence of badness lying in the heart—the love of evil for evil's sake—as where a man is impelled to do mischief to those who never injured him; and it is in this disposition to injure, from what he calls an abandoned heart, that *Blackstone* understood it in its legal sense. (4 *Com.* 200.) Lord HOLT distinguishes it from *hatred* or *rancor*, which may exist simply as a feeling; but the intention to injure being an ingredient in malice, he defines it to be “a design formed of doing mischief to another.” *The Queen* agt. *Mawgridge*, (*Kelynge's R.* 127.) Chief Justice RUSSELL, in his work on crimes, refers to it “as a term of law denoting, directly, wickedness, and excluding just cause or excuse,” (1 *Russell on Crimes*, 488); and BEST, J., in *The King* agt. *Harvey*, (2 B & C. 257), which was an indictment for libel, defines it to be “any wicked or mischievous intention of the mind.” In criminal prosecutions for libel, this malice, or wicked and mischievous

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intention of the mind, is of the very essence of the offence, (*Commonwealth agt. Clapp*, 4 *Mass. R.* 163.) It is called malice in law, because it is an inference which the law draws from the criminal nature of the act, but which may be rebutted by showing that there was no malicious intent to do an injury either to the individual or to the public. (*The King agt. Lord Abington*, 1 *Esp.* 228; 1 *Russ. on Crimes*, 250; *Want's Case*, *Sir Fr. Moore*, 627.) In the criminal prosecution it is necessary, therefore, to aver, in the indictment, that the words were published maliciously, (*Anon.*, *Styler R.* 392), but in the civil action for damages, this averment is not necessary. This was expressly adjudged upon error in *Mercer agt. Sparks*, (*Owen*, 51, and see *Sir Fr. Moore*, 459; *Noy*, 35), and though it is said, in the report of that case, that the averment was unnecessary, as the words were in themselves malicious, the reason given by the reporter is not the correct one, as it would apply equally to an indictment for libel, where such an averment is necessary.

In the anonymous case cited from *Styler*, *ROLLE*, Ch. J., pointed out the distinction between the civil action and the criminal prosecution, declaring that it was not necessary to aver, in a declaration, that the words were published maliciously, though it was in an indictment, or upon filing a criminal information. But, although this has been settled to be the law for more than two hundred years, it has been the fashion with pleaders, both ancient and modern, as *Starkie* remarks, to deal so profusely with the evil motives of the defendant, that such an averment is rarely found wanting; and it is to this persistent and constant use of it that we owe the erroneous impression that, in all cases, malice is, in some sense, the gist of the action. Thus, in *Smith agt. Richardson*, (*Willis*, 24), four of the twelve judges were of opinion that malice was the gist of the action, because, as they expressed it, the words are always laid in the declaration to have been spoken falsely and maliciously; and Justice *BAYLEY* cites this opinion without perceiving, or at least without noticing, that the conclusion arrived at by the four judges was founded upon the mistaken impression that this averment in the declaration was a material

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one. In the adjustment of damages, malice may become an element, and its existence presumed; for, if nothing is shown in mitigation, the jury would be warranted in assuming that the publication was made with a malicious intent to injure, and evidence, tending to show either the absence or the existence of malice, is always received to diminish or to enhance the damages. (*Gilman* agt. *Lowell*, 8 *Wend.* 573; *Root* agt. *King*, *ibid.* 139.) But it is an error to suppose that malice, except when the words are privileged, is in any way essential to a cause of action. If the words are averred in the complaint to have been published maliciously, the defendant cannot take issue upon that averment, (*Fry* agt. *Bennett*, 5 *Sandf.* 62; *Howard* agt. *Sexton*, 4 *Comst.* 160), nor, except where the communication is privileged, will the most conclusive evidence of the absence of a malicious intent furnish any answer to the action, as it goes only to the question of damages. The motive of the defendant is wholly immaterial, so far as it respects the right of action. It may be a good or a bad one. The defendant may have heard the slander from another, believed it to be true, have had very satisfactory reasons for so believing, and felt that it was his right, as well as his duty, to represent what he honestly supposed to be the plaintiff's true character; but all this goes only in mitigation of damages. *Gilman* agt. *Lowell* (*supra*,) affords a good illustration:—the plaintiff had sworn, in a cause, that he was the owner of land, the deed of which was recorded in the clerk's office of a certain county; the defendant caused an official search to be made in the clerk's office, and, the deed not being found in consequence of a mistake in the indexing of the records, the clerk informed him that there was no such deed upon record, and the defendant, upon receiving this intelligence, accused the plaintiff of having sworn falsely. The plaintiff brought his action, and all this went only in mitigation of damages. The real foundation of the action is, the right of the plaintiff to recover a pecuniary satisfaction for an injury sustained, and it is wholly immaterial what may have been the motive of the person who caused the injury. The act must have been intentionally

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done—the meaning of which is, that the defendant should know what he publishes; for, as in the case put by *Starkie*, if a servant deliver a sealed letter containing the defamatory matter, without knowing its contents, he would not, though the actual instrument of publication, be liable to an action. (*Lamb's case*, 9 *Coke*, 59.) If the defendant knows what he publishes, the inference is, that he meant it should have the effect of lessening the character of the plaintiff in the estimation of the community; for, in the language of Lord TENTERDEN, in *The King agt. Harvey*, (2 *B. & Cres.* 257), “he must be presumed to have intended to do that which the publication is calculated to bring about.” This is a presumption of law from the act of publication. It is the only presumption which it is necessary to draw; and to denominate this intent malice, or malice in law, when it may have arisen from a good motive, the defendant believing what he alleges to be true, is to employ the word *malice* in a sense neither justified by its etymology, its ordinary meaning, nor its previous legal signification. To do so gives rise to confusion in respect to the meaning of the word, and involves the necessity of distinguishing two kinds of malice, whereas there is, and can be, in such an action, but one kind; for, whether the existence of malice is presumed, in the adjustment of damages, from the absence of anything in the mitigation, or it is proved as a fact to enhance damages, or to maintain the action where the communication is privileged, it is generically the same thing in either case.

Where the occasion upon which the words were published was a privileged one, the existence of malice shows that the party was not acting in the discharge of a duty, or in the exercise of a right which the law, upon grounds of public policy, would otherwise presume to have been the fact. The protection which the occasion affords is founded upon the just and rational principle, that one who is not a volunteer, but whose duty or right it becomes to discuss or speak of the character of another, is not to be restrained by the fear of an action for defamation, but may freely declare what he honestly and truly believes. The law presumes that he did so, and upon

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that presumption exempts him from all liability, though what he said was unfounded in fact, and though its effect may have been highly detrimental; but the existence of malice removes this presumption, and places him upon the footing of a mischievous and malicious defamer.

Malice may be shown by the proof of an extrinsic fact, or it may be inferable from the manner in which the publication was made, even though the subject matter of the communication was relevant, and the occasion a privileged one. In *Wright agt. Woodgate*, (1 *Tyr. & Gr.* 12), the letter written by the defendant was privileged, and all that was stated was pertinent to the subject matter of the communication, which was to dissuade the person to whom it was written, from giving his consent that another solicitor might be appointed for the plaintiff, in place of the defendant. PARKE, B., said that the whole of the letter was a privileged communication; that the occasion of writing it rebutted the presumption of malice, and threw upon the plaintiff to show that there was malice, and that that might be made out by directing the attention of the jury to the language of the letter itself, or by proving, by extrinsic evidence, that the defendant entertained malicious feelings. So in the present case, though the occasion was one in which the defendant had a right fully to discuss the character of the plaintiff, and the fitness of requesting the architect to appoint him engineer, and though the charge made was relevant to the matter under discussion, still, the way in which it was made, the broad statement by the defendant that he knew that the plaintiff was the author of the caricature, was going very far. It was an assumption of knowledge of the existence of what was asserted, precluding all doubt and forestalling all inquiry; and, when it is taken into connection with what is averred in the complaint, that the plaintiff was not the author of the caricature, and was wholly guiltless of any complicity therein, I think it would be presumptively sufficient to entitle the jury to pass upon the question of malice.

In *Roger agt. Clifton*, (3 *B. & P.* 587), and in *Child agt. Affert*, (9 *B. & C.* 403), which were cases of privileged communication,

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positive proof by the plaintiff, that what was stated in the communication was false, would seem to have been regarded by the court as sufficient to raise the question whether the communication was made *bona fide* or not.

But, independent of this, I am not aware that anything more has ever been required in such cases, than to aver generally, as has been done in this complaint, that the defamatory matter was published *ex malitia*—that is, averring the fact substantively; and it cannot be necessary to set forth all the circumstances upon which the plaintiff means to rely to prove it. The usual mode of averring it is, that, “contriving and maliciously intending to injure the character of the plaintiff, and to bring him into public scandal and disgrace, the defendant published, &c., of and concerning the plaintiff, &c.” This is the form given by the elementary writers, where the communication is privileged. (2 *Starkie on Slander*, 385; *Cooke on Defamation*, 311; *Chitty on Pleading*, 630, 6th Am. ed.) This was the averment used in *Rogers agt. Clifton*, (3 Bos. & Pul. 587), and in *Pattison agt. Jones*, (8 B. & C. 578.) In analogous actions, where the proof of malice is essential to maintain the action, this general form of averring it has been considered sufficient. (*Barnadistone agt. Some*, 2 Lev. 114; *Mileward agt. Sergeant*, referred to in note B. to *Hermans agt. Tuppen*, 1 East. 555.) And in my own experience, (a somewhat extensive one, for I have tried a great number of actions of this description, many of them contested by very able and experienced counsel), I do not remember a case where the pleader thought it necessary to set forth the facts and circumstances upon which he meant to rely to establish malice, or where anything more was contained in the declaration than a general averment that the act was done maliciously.

The remaining point raised by the demurrer is, that the complaint should show, in respect to the publication, that there was a want of probable cause for making it. The want of probable cause, as essential to a right of action, arises only in cases of malicious prosecution, or those actions for defamation which are analogous to them—a class of actions generally dis-

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couraged, (*Saville agt. Roberts*, 1 *Ld. Ray*. 374; 12 *Mod.* 208; 1 *Salk.* 18); as it is to the public interest that all persons should be free to make complaints, before the proper tribunals, of all matters affecting their own or the public interest, without being liable in damages if the charges made by them should turn out to be unfounded, this exemption extends to the complainants and to all persons, judges, jurors, witnesses, attorneys or public officers, who take part in the proceeding; and no action will lie for any injury to person, reputation, or property, growing out of it, unless it is shown that the party who originated and set it on foot, had no reasonable or probable cause for so doing. Probable cause, in such a case, is a belief founded upon a reasonable ground of suspicion of the truth of the charge made, and it is incumbent upon the party who brings such an action, to aver and prove that there was a want of probable cause. It is generally a legitimate inference, from the want of it, that the party prosecuting was influenced by malice; but not absolutely so in all cases, as he may honestly believe in the truth of the charge he makes, but act upon insufficient grounds of suspicion—as in *Merman agt. Mitchell*, (13 *Maine*, 439),—the rule being, that the circumstances which warrant a reasonable ground of suspicion, must be such as would induce a cautious man to believe in the truth of the charge. (*Munns agt. Nemours*, 3 *Wash. C. C.* 37.) Whilst, again, proof of the most express malice will not support such an action, if there were probable cause, of which *Foshay agt. Ferguson* (2 *Denio*, 617,) is a striking example. The want of probable cause, therefore, may exist with or without malice; and, as it is the foundation of the action, this ingredient essentially distinguishes the action from one brought for defamatory matter maliciously published upon a privileged occasion.

I am disposed to think that the present action, though in form an action for slander, is sufficiently analogous to demand the application of the rule that prevails in actions for malicious prosecution, and that proof of the want of probable cause is essential to sustain it. *Howard agt. Thompson* (21 *Wend.* 319,) was an action for libel, in sending a written communication to

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the secretary of the treasury, accusing the plaintiff, who was a subordinate officer of the secretary's department, of various acts of speculation and fraud upon the government, and requesting his removal; and, after mature consideration, it was held that, though in form an action for libel, it was essentially, in principle, like an action for a malicious prosecution—that proof of the want of probable cause was necessary. If a person had sent a remonstrance to the board of commissioners, against the employment of the plaintiff, containing the same charge which the defendant made before the board, the remonstrant would have occupied a position similar to that of the defendant in *Howard agt. Thompson*; and certainly the defendant in this case, for what was said by him at the deliberations of the board, where he was acting in the capacity of a public officer, comes as fully within the reason of the rule.

The complaint here does not aver, in so many words, that there was a want of probable cause, but I think it sufficiently shows it. As before stated, it alleges that the plaintiff was not the author of the caricature, and had no complicity therein. This, I think, is all that the plaintiff should be required to prove, in such a case, to make out *prima facie* the want of probable cause. In ordinary cases of prosecution, complaints, or petitions, whether made to judicial tribunals or to public officers, the party who institutes the proceeding, necessarily lays before the body or officer the facts or circumstances upon which he rests his charge, to satisfy or convince the authority he addresses that a case exists demanding its interference or action. The accused is thus advised of what is relied upon to maintain the accusation against him, and may give such explanation of the circumstances, or submit such proof in connection with them, as will show that the defendant acted without reasonable grounds of suspicion. But in this case, the defendant, before a public body of which he was a member, made a positive charge of a very grave nature against the plaintiff, without affording the slightest clue as to the facts and circumstances upon which he relied for the truth of his assertion. He stated that he knew that the plaintiff was the author of the caricature,

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without stating how, or upon what, his knowledge was founded, and all, I apprehend, that the accused party can do in such a case, is to go upon the stand, and swear that he was not the author, and knew nothing about the making or publication of the caricature; and if, after such proof is submitted, the defendant can furnish no explanation of the grounds, facts, or reasons which induced him to make so positive a charge, the plain inference must be that he has none to offer, and that it was made without any cause whatever. Such a state of facts would, in my judgment, be ample evidence of want of probable cause.

Judgment must, therefore, be given for the plaintiff upon the demurrer.

NEW-YORK COMMON PLEAS.

JACOB D. C. OUTWATER agt. THE MAYOR, &c., OF THE CITY OF NEW-YORK.

The *fifth* section of the act of 1859, (*Laws* 1859, p. 1127), authorizing the comptroller of the city of New-York to take all proper and necessary means to open and reverse any judgments against the city, which he shall have reason to believe was obtained by collusion or founded in fraud, is *not unconstitutional*.

An affidavit of the comptroller, that he has reason to believe that the judgments were obtained by collusion and fraud, is not of itself sufficient to entitle him to have the judgments opened or reversed. It is sufficient, however, to entitle him, on application to the court, to "take all proper and necessary means to have them opened or reversed;" but it rests in the sound discretion of the court whether the application will be granted or not. (*This case, and the three following, were judgments obtained against the city upon report of sole referees, and were severally set aside, and new trials ordered, upon the facts disclosed in the respective cases.*)

New-York, Special Term, April, 1860.

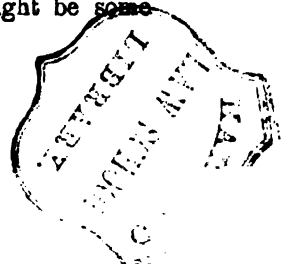
WILLIAM CURTIS NOYES, *for comptroller.*

DALY, F. J. It is objected to this motion, that the fifth section of the act, (*Laws of* 1859, p. 1127), under which it is made, is unconstitutional. The constitution declares (*Art. 3, § 16,*) that "no private or local bill, which may be passed by

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the legislature, shall embrace more than one subject, and that shall be expressed in the title." The title of the act in question is, "An Act to Authorize the Supervisors of the City and County of New-York to raise Money by Tax." The first and second sections authorize the supervisors to raise a specified sum by tax, to be applied to certain objects and purposes which are named in the act. The third section authorizes them to direct the comptroller to issue revenue bonds to an amount sufficient to pay any judgment obtained against the city, other than those mentioned and provided for in the second section, and to satisfy claims of members of the police force for back pay, or arrearages of salary, and to raise by tax the next succeeding year—that is, in 1860—a sum sufficient for the redemption of the above-mentioned bonds, with interest; and the *fifth* section, the one in question, authorizes the comptroller to take all proper and necessary means to open and reverse any judgments against the city, which he shall have reason to believe was obtained by collusion or founded in fraud, and for that purpose to use the name of the defendants, and to employ counsel.

I think the fifth section comes clearly within the subject of the act, as expressed in its title. The amount of the revenue bonds, and the amount of the tax to be raised by their redemption, will depend upon the amount of the judgments to be paid; and if any of those judgments should be reversed, and judgment given for the city; or if any of them should be reduced in amount, through the steps which the comptroller is authorized to take by this section; the amount for which revenue bonds are to be issued, or at least the amount to be raised by tax, in 1860, for their redemption, will be proportionably lessened. A proviso, therefore, in an act authorizing the supervisors to raise money by tax, which contemplates the possible reduction of the amount to meet which the tax is to be imposed, is as much a part of the subject of the act, indicated by the title, as any other part of it. If the act had named the sum which was to be raised to meet the claims of the police force, and the judgments referred to, there might be some



doubt; but, as it is left to the supervisors to ascertain the amount for which it will be necessary to issue revenue bonds, as well as the amount necessary for their redemption, and as the obligations for which provision is to be made, may be reduced through the means which the comptroller, by this section, is authorized to take, it is very clear to my mind that this provision appertains to, and forms a part of, the whole subject of the act.

An affidavit of the comptroller, that he has reason to believe that the judgments were obtained by collusion and fraud, is not of itself sufficient to entitle him to have the judgments opened or reversed. His belief, in that respect, shown to the court, is sufficient to entitle him, in the language of the act, to "take all proper and necessary means to have them opened or reversed," but it rests in the sound discretion of the court whether the application will be granted or not.

The judgment in this case was for damages arising from the settlement and cracking of the plaintiff's buildings, the referee finding that the foundations were weakened by water flowing into the cellars of the buildings from one of the city sewers—the mouth of the sewer being obstructed. The case, which was eminently one to be tried by a jury, was referred, by the written consent of the corporation counsel, to a single referee. The only witness who testified that the buildings settled and cracked, in consequence of the water flowing into the cellar from the sewer, was the plaintiff himself. A builder was called to prove the damages, whose testimony is embraced in four lines—that he had examined the buildings, and that it would cost *all* of five thousand dollars to put them in the same condition, as nearly as may be, as they were in before the water came in. The counsel of the corporation was not present at the hearing before the referee, but one of his assistants acted in his stead. No witnesses were called on behalf of the city. No examination of the buildings, on the part of the city, either as to the cause of the injury or as to the extent of the damage, appears to have been made; for, I take it, from the diligence shown in procuring affidavits to resist this motion, that if it had been the fact it would have been shown. The builder was not

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asked by the assistant of the corporation counsel whether he made any estimate of the damage, and of the cost and expense of putting the buildings in the same condition as before, as near as might be; or how he arrived at the sum of five thousand dollars, whether it was a mere general guess, or founded upon a positive and accurate estimate, such as it might be presumed he would carefully make if about to enter into a contract to restore the buildings, as far as possible, to their former condition: and upon the loose, general testimony of this builder, and the testimony of the plaintiff as to the cause of action, the case was submitted, on the part of the city, to the referee, who gave judgment for the whole amount claimed in the complaint—that is, \$5,000.

The comptroller swears that he knows that he will be able to prove, if a new trial is granted, that the houses were built cheap, for tenement houses, upon made soil, recently filled in from the waters of the East river, and were liable to settle and crack; that other buildings in the same neighborhood have also settled and the walls cracked, arising principally from the character of the newly made soil upon which they were erected. And this fact, certainly a very important one, is neither controverted nor questioned in the affidavits made on behalf of the plaintiff. The comptroller further swears that he knows that he will be able to prove that the damages sustained by the plaintiff, in reference to the buildings, did not exceed \$500; that he has caused them to be examined by competent builders, to ascertain the amount of the actual damage sustained by the plaintiff—and will be enabled to show that the principal damage was done to the rear walls; that no other damage of any importance was done to the property; that the whole damage does not exceed the sum before mentioned, and that such builders offer to rebuild the entire rear walls for the sum of \$1,000, and completely restore the plaintiff's property to its former condition.

The plaintiff swears that he met the persons sent by the comptroller; that they only examined the outside of the houses, and did not go through them, or examine the side

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walls; and that he proposed to show them other damages or injuries, which they declined to examine; that the damages are not confined to the rear walls, but that all the walls of all the houses are injured. He has also submitted the affidavits of four builders, who swear that they have examined the buildings, and that it will cost five thousand dollars to replace the damage done to them by the overflow of the sewer; but this testimony is of the same general character as that of the builder who testified on the trial. It does not appear that any one of them made any estimate of the actual cost and expense, nor do they show how they reach a sum expressed in round numbers at five thousand dollars. The plaintiff and his attorney also swear that the judgment was not obtained by collusion, and is not founded in fraud; but was fairly recovered.

I think, upon the facts here presented, that we are called upon to open the judgment, and order a new trial. The discretion with which courts are clothed to order new trials, is very well expressed by Mr. Graham, after a full review of the authorities:—"Error," he says, "is the strict right of the party relying upon the legal conviction of the court; but motions to avoid verdicts take a wider range, and are, for the most part, addressed to the discretion of the judge, upon the equity and conscience of the case." (*Graham on New Trials*, 1st ed.)

In view of the facts submitted on the part of the comptroller, and of the manner in which the case was defended, I think we are called upon to interpose for the protection of the interest of the city, and I shall therefore direct that the judgment be set aside and a new trial ordered.

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CHARLES BRUSH agt. THE MAYOR, &c.

All the questions of law involved in the respective motions made in these causes, have been decided in the preceding case of *Outwater agt. The Mayor, &c.*; and the same decision will be rendered here.

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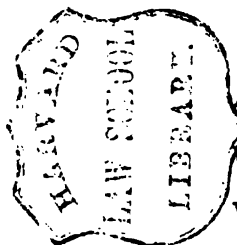
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